COURT MARTIAL

Citation: *R. v. D'Amico*, 2020 CM 2002

Date: 20200221
Docket: 201912

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Corporal D.P. D'Amico, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

DECISION ON PLEA IN BAR OF TRIAL

(Orally)

Introduction

[1] This decision is being delivered in response to a hearing conducted on 17 January 2020 on a plea in bar of trial. Among other relief requested, the accused, Corporal D'Amico, asks the Court to terminate the proceedings against him for lack of jurisdiction. His request is based on the argument that the issuance of a Chief of Defence Staff (CDS) Order on 2 October 2019 titled, "CDS DESIGNATION 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" (CDS Order 2019) places military judges under the disciplinary jurisdiction of the military chain of command, being part of the executive, which compromises his rights as an accused person under paragraph 11*(d)* of the *Canadian Charter of Rights and Freedoms* (*Charter*), *Constitution Act*, 1982. Paragraph 11*(d)* reads as follows:

> 11. Any person charged with an offence has the right
>
> . . .
>
> *(d)* to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[2] It is the accused's position that CDS Order 2019 places the military chain of command in a position to discipline military judges. He argues that the tension that flows from military judges being subject to the jurisdiction of the chain of command for "any disciplinary" matter, leads the informed accused to reasonably conclude that military judges do not enjoy the essential conditions of judicial independence given the aspects of institutional independence at play.

[3] The impugned CDS Order 2019, replaced a CDS Order of the same title, dated 9 January 2018 (CDS Order 2018) with similar wording. CDS Order 2018 was the first CDS order ever issued specifically focussing on military judges as a group. This explains why this issue has only now risen to the forefront. The controversial paragraphs of CDS Order 2019 read as follows:

> "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 <u>any disciplinary matter</u> involving a military judge on the strength of the Office of the Chief Military Judge;
>
> . . .
>
> 2. The next superior officer in matters of discipline to whom the DVCDS is responsible, when acting as a commanding officer referred to in paragraph (b) shall be the Vice Chief of the Defence Staff (VCDS)" [Emphasis added]

[4] In essence, the novel issue before this Court is whether the accused's right under section 11*(d)* of the *Charter* is violated due to an alleged lack of independence and impartiality of the military judiciary. Both the Court and counsel have the benefit of the very thorough reasons delivered on 10 January 2020, by Pelletier M.J., in the case of *R.*

v. Pett, 2020 CM 4002, responding to the same indistinguishable issue. In *Pett*, Pelletier M.J. concluded the impugned CDS Order 2019 was unlawful and "to be of no force or effect as it pertains to paragraphs 1(b) and 2 applicable to any disciplinary proceedings involving a military judge." In rendering his decision in *Pett*, Pelletier M.J. proposed that the solution to the real or perceived violation of an accused's rights under section 11*(d)* was mitigated by finding that the Code of Service Discipline (CSD) does not apply to officers who are serving as military judges.

[5] Despite the decision in *Pett*, rendered only seven days before the hearing of the application on 17 January 2020, counsel on both sides confirmed that the impugned CDS Order 2019 remains in effect.

[6] With the decision in *Pett* and the submissions of counsel, it is clear that there must be a dividing line between discipline administered with respect to judicial functions, versus discipline rendered for conduct that may otherwise be contrary to the CSD for which military judges are liable in their status as officers in the Canadian Armed Forces (CAF).

[7] The crux of the issue before the Court is not whether the dual roles of officer and military judge are incompatible because both Parliament, and the Supreme Court of Canada (SCC) in *R. v. Généreux*, [1992] 1 S.C.R. 259, have recognized the role of military judges as both judges and serving officers. Rather, the issue before the Court requires it to consider what constitutes a permissible degree of connection between the military chain of command and its judges that still ensures that every accused appearing before a court martial does so before an independent and impartial tribunal as guaranteed by section 11*(d)* of the *Charter*.

[8] In light of the decision on the same indistinguishable issue in *Pett*, the issues for this Court to decide are narrowed down as follows:

a. What is the effect of the decision in *Pett* on the same issue before the Court? Specifically:

   i. Is there a requirement to rehear the same issue already decided in an earlier application;

   ii. In applying judicial comity, do any of the three exceptions apply?

b. Did Pelletier M.J. go too far in concluding that military judges may not be held accountable under the CSD while they are serving as military judges?

Issue #1 - What is the effect of the Pett decision on the current application?

Legal Framework

[9] It is best to begin an analysis with a reminder of the twofold purpose of judicial independence. In short, the following purposes were set out in 1986 by Dickson C.J. in the SCC case of *R. v. Beauregard*, [1986] 2 S.C.R. 56 as follows:

(a) To allow judges complete liberty to hear and decide cases that come before them:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider, be it government, pressure group, individual or even another judge should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

(b) The institutional role of the judiciary is to protect the fundamental values embodied within the *Charter*. In order for judges to fulfil their institutional role in Canada, the judiciary forms an independent branch of government whose duty is to protect the *Constitution*. Notwithstanding the existence of a separate system of military justice, military judges hold the same role as protector of the *Constitution* which includes the fundamental values embodied within the *Charter* which applies equally to members of the CAF.

[10] In *Beauregard*, at paragraph 30, the court recognized that in order for the two purposes to be fulfilled, the judiciary must be "completely separate in authority and function from all other participants in the justice system."

[11] A few years after *Beauregard*, in its decision in *R. v. Lippé*, [1991] 2 S.C.R. 114, the SCC recognized that the complete separation envisioned in *Beauregard* may not always be possible. It concluded that while a system which allows for part-time judges is not the ideal system, section 11*(d)* of the *Charter* does not guarantee the "ideal" in judicial independence.

[12] A year later, in *Généreux*, Stevenson J., also writing for La Forest and McLachlin J.J. summarized the same impediments to judicial independence that this Court is grappling with almost 30 years later:

> The difficulty in applying the concepts in *Valente* to assess military tribunals is, I think, largely attributable to the difficulty in defining the concept of "the executive" from which there must be independence.
>
> . . .
>
> The core value with which we are concerned is summarized by Dickson C.J. in *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, as "[t]he ability of individual judges to make decisions in discrete cases free from external interference or influence ..." (p. 69). Executive or legislative interference or the reasonable apprehension of such interference must be guarded against.

> Carried to its logical conclusion, this concern would mandate a completely independent military tribunal. However attractive that argument might be, it was not made, and on the authority of the majority in MacKay, would be difficult to sustain.

[13] In *Généreux*, in accepting the dual role of military judges, the court recognized that some degree of connectivity was impossible to avoid. Lamer C.J., leveraged the conclusion reached by James Fay where he explained why a complete severance of the military and its judges as established in *Beauregard* was not preferred.

> In this regard, I agree with the conclusion reached by James B. Fay in Part IV of his considered study of Canadian military law ("Canadian Military Criminal Law: An Examination of Military Justice" (1975), 23 Chitty's L.J. 228, at p. 248):
>
> > . . . . If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.
>
> In my view, any interpretation of section 11*(d)* must take place in the context of other *Charter* provisions. In this connection, I regard it as relevant that section 11*(f)* of the *Charter* points to a different content to certain legal rights in different institutional settings . . .

[14] Since *Généreux*, the *National Defence Act* (*NDA*) has been substantially revised in efforts to enhance judicial independence of military judges. Some of the worthy landmarks were well laid out by Pelletier M.J. in the *Pett* decision:

> 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*. 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.
>
> [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.
>
> [52] An important landmark on the road to judicial impartiality came in 1997 with the release of the First and Second Dickson reports as well as the Somalia Inquiry Report. These reports addressed the fundamental importance of independence of the military judiciary. Many of the recommendations found in these reports were implemented in Bill C-25 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. The *Lamer Report* remarked that despite significant improvements, the measures put into place to ensure the independence of the military judiciary remains inadequate. A recommendation was made to confer security of tenure to military judges until retirement. 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. Legislation to accomplish this security of tenure requirement came into force a few days before the deadline.
> [Footnotes omitted]

[15] Many of the improvements to judicial independence are captured within the *NDA* from the point of appointment to retirement. The *NDA* prescribes subtle differences between the appointments of military judges in comparison with those of their civilian counterparts.

[16] For example, like their civilian counterparts, military judges are appointed based upon merit by the Governor in Council and are required to have at least ten years of standing at the bar of a province prior to their appointments, however, military judges are also required to have a minimum of 10 years' experience serving as a military officer, a requirement that sets them apart from their civilian peers (*NDA*, subsection 165.21(1)). Military judges have security of tenure until retirement, but the *NDA* establishes that retirement be at 60 years of age, while it is from 70 to 75 years for their civilian counterparts (see, for example, section 8 of the *Judges Act*).

[17] Similarly, while it is the Canadian Judicial Council that holds jurisdiction to recommend the removal of a civilian judge (see sections 63 to 66 of the *Judges Act*), it is the Military Judges Inquiry Committee, composed of justices of the Court Martial Appeal Court (CMAC) who fulfil this same function for military judges (see *NDA* section 165.31).

[18] In *Pett*, Pelletier M.J. provided extensive background on the Military Judges Inquiry Committee, of which the following bears repeating:

> [90] The Military Judges Inquiry Committee is made up of judges from the CMAC. 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 the 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 that the military judge be removed if, in its opinion,	**(7)** Le comité peut recommander au gouverneur en conseil de révoquer le juge militaire s'il est d'avis que celui-ci, selon le cas :
(a) the military judge has become incapacitated or disabled from the due execution of his or her judicial duties by reason of	**a)** est inapte à remplir ses fonctions judiciaires pour l'un ou l'autre des motifs suivants :
(i) infirmity,	**(i)** infirmité,
(ii) having been guilty of misconduct,	**(ii)** manquement à l'honneur et à la dignité,
(iii) having failed in the due execution of his or her judicial duties, or	**(iii)** manquement aux devoirs de la charge de juge militaire,
(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	**(iv)** situation d'incompatibilité, qu'elle soit imputable au juge militaire ou à toute autre cause;
(b) the military judge does not satisfy the physical and medical fitness standards applicable to officers.	**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. These provisions are also broader than those applicable to other judges of federal nomination, found in the Judges Act 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. 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.
> [Footnote omitted.]

[19] The above summary on the Military Judges Inquiry Committee provides helpful context to inform this Court's analysis. However, what is most important to keep at the forefront is the fact that even with the lack of an absolute separation between military judges and the chain of command, an accused is still entitled to the full uncompromised rights that flow from section 11*(d)* of the *Charter* and the challenge is to determine exactly how this should be achieved.

Why must this Court rehear this same issue considered in Pett?

Position of the parties

Applicant

[20] Defence provided no specific submissions on the decision in *Pett*, other than to urge the Court to stay or terminate the proceedings against the accused in order to send a message to Parliament that the issue before the Court is serious and requires legislative intervention.

Respondent

[21] Relying upon the underlying reasoning by the SCC in the case of *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130 and the fact that the declaration in *Pett* was made pursuant to the Court's powers under section 179 of the *NDA*, the prosecution argued that the declaration of the military judge rendered in *Pett* applies only to the court martial in *Pett* and not to the case at bar.

[22] He further submitted that even though Pelletier M.J. declared the order to be of no force and effect, it did not have the effect of cancelling it. He argued that as long as the CDS Order 2019 remains in effect, then it is open to any accused to continue to raise this issue as they see fit.

Analysis

[23] A court martial is a statutory court that has the same powers, rights and privileges as a superior court of criminal jurisdiction including the power to punish for contempt as are vested in a superior court of criminal jurisdiction and with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and to all other matters necessary or proper for the due exercise of its jurisdiction.

[24] In a nutshell, the SCC decision in *Lloyd* limits judges not otherwise foreseen under the *Constitution Act* from making general declarations of invalidity of legislation passed under section 52 of the *Constitution Act*. However, *Lloyd* does clarify that courts have the power to decide on the constitutionality of laws that are properly before the court. In courts martial, military judges have the power to decide all those matters required to properly adjudicate the cases before them. If an issue arises as to the constitutional validity of a law, order or policy, a military judge has the power to determine the issue as part of its decision-making process in the particular case before them.

[25] The effect of a finding by a military judge that the CDS Order 2019 does not conform to the *Constitution* permits the judge to refuse to apply it in the case before it, but until the order is formally cancelled or rescinded, it remains in full force and effect.

[26] The prosecution acknowledged and agrees with the Military Judge Pelletier's characterization in *Pett* that the CDS Order 2019 is not a law passed under section 52 of the *Constitution Act*, and consequently, section 52 does not apply. The formal pronouncement made in *Pett* was done under section 179 of the *NDA* which permitted the proceedings in the *Pett* court martial to continue. Section 179 of the *NDA* provides the authority for a declaration of invalidity necessary for the Court to have and exercise jurisdiction.

[27] In *Pett*, Pelletier M.J. made a formal pronouncement declaring the CDS Order 2019 unlawful and of no force and effect. After doing so, under the authority of section 179 of the *NDA*, the application for a plea in bar was dismissed and the Court exercised its jurisdiction over Master Corporal Pett.

> [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.

[28] At paragraph 146 of the *Pett* decision, Pelletier M.J. alluded to the fact that he expected the order to be cancelled. As of the delivery of this decision, it has not yet been rescinded or cancelled. In light of the continued existence of the CDS Order 2019, it was uncontested that although the SCC in the decision of *Lloyd* does not specifically apply, its underlying reasoning requires each ad hoc court martial to separately address this issue when raised.

Judicial comity

[29] Courts martial or any other courts operating at the same level apply "judicial comity" following the same decision as a judge of the same court, unless it is in the interests of justice to do otherwise. (See *Re Hansard Spruce Mills Ltd*., [1954] 4 D.L.R.).

[30] Due to the ad hoc nature of courts martial, in order to provide the requisite certainty and consistency, the principle of judicial comity is critical. The judicial comity followed at courts martial is well laid out in the case of *R. v. Caicedo*, 2015 CM 4018 at paragraphs 20 and 21. It reads as follows:

> In my view, the principle of judicial comity should be applied between military judges presiding different courts martial in order to promote certainty and consistency in the law. It is proper for judicial comity to be applied before courts martial, in the same way as it is applied before the Federal Court whose judges apply judicial comity between them, as recognized, for instance, in *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1025 (*Almrei*), at paragraph 61. Wilson J. of the BC Supreme Court expressed best what judicial comity should mean for a judge in *Re Hansard Spruce Mills Ltd.* 1954 CanLII 253 (BC SC), [1954] 13 W.W.R. (N.S.) 285, in these words:
>
> > I have no power to override a brother judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.
>
> [21] Yet, judicial comity is not to be applied absolutely. Wilson J. went on to state that a judge should only decline to follow a decision of the same court if: (1) subsequent decisions have affected the validity of the previous decision, (2) it is demonstrated that some binding precedent or relevant statute was not considered, or (3) the judgment was not considered, as it was given as an immediate decision without opportunity to consult authority. Similar exceptions were adopted by the Federal Court (*Almrei* at paragraph 62). These exceptions support another important principle relevant to legal precedents, namely correctness. A judge can depart from judicial comity to avoid perpetuating an error in the interpretation of the law.

[31] In short, a military judge should only decline to follow a prior holding of another military judge on a point of law if there is a contradictory decision from another court on the same point, the decision is contrary to binding authority of the Supreme Court of Canada or was made *per incuriam*. The prosecution submits that this was a new and novel issue that Pelletier M.J. was pressed into rendering under a tight time constraint and it appears that he might not have had the time to consult the case of *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983. He argued that although he did draw Military Judge Pelletier's attention to the *Cawthorne* case, in his view, it does not appear that Pelletier M.J. considered the presumption that actors involved in the military justice system will act reasonably.

[32] Upon the Court's review of the *Pett* decision, it noted that Pelletier M.J. made reference to paragraphs 23 and 32 of *Cawthorne* when he acknowledged at paragraph 74 of the *Pett* Decision, "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." (see footnote 81 of *Pett* that references *R. v. Cawthorne*, at paragraphs 23 and 32.)

[33] In *Cawthorne*, the SCC had to answer whether section 230.1 of the *NDA*, giving the Minister of National Defence (MND) the right to appeal cases decided in military

courts, violated sections 7 and 11*(d)* of the *Charter* which guarantees an accused person's right to be tried according to the principles of fundamental justice, especially if his or her liberty is at stake.

[34] In rendering its decision in *Cawthorne*, the SCC examined whether a member of Cabinet can be truly independent to exercise the functions with respect to the administration of justice, independent of its partisan concerns. It focussed primarily on the concepts of "political" and "partisan." Writing for the unanimous nine-member Court, McLachlin C.J. said at paragraph 32:

> The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General — also a member of Cabinet — can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard.
> [Emphasis added]

[35] Essentially, in *Cawthorne*, the SCC declared independence of prosecutorial decisions from partisan considerations "a constitutional principle" that applies equally to the MND who may make prosecutorial decisions in the military justice system. Notwithstanding this, there are a number of concerns that surface based on the prosecution's position that the presumption set out in *Cawthorne* and the procedural safeguards built into the process compensate and protect against any improper exercise of discretion.

[36] Firstly, this Court notes that the recent decision of the Supreme Court in *R. v. Cawthorne* did not overrule *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 (referenced in both the *Stillman*, 2019 SCC 40, and *Lloyd* decisions), a decision decided the year before *Cawthorne*. In *Nur*, McLachlin C.J. declined to accept the submission that the constitutionality of section 95 of the *Criminal Code* could be salvaged by relying on the discretion of the prosecution and went on to explain why an unconstitutional law cannot be saved on a case-by-case basis by prosecutors:

> [91] The argument of the Attorneys General of Canada and Ontario, however, goes further. They seek to insulate otherwise unconstitutional laws through the exercise of prosecutorial discretion as to when and to whom the laws apply. But unconstitutional laws are null and void under section 52 of the *Constitution Act*, 1982. The Attorneys General's argument is essentially the converse of a constitutional exemption. As I observed on behalf of a unanimous Court in *Ferguson*, "[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice": para. 72. It deprives citizens of the right to know what the law is in advance and to govern their conduct accordingly, and it encourages the uneven and unequal application of the law. To paraphrase *Ferguson*, bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada: paras. 72-73.
> [Emphasis added]

[37] In *Nur*, McLachlin C.J. rejected a similar argument to that of the Director of Military Prosecution (DMP). In short, the argument was that any injustice caused was saved by the actions of the Crown. McLachlin C.J. wrote:

> [85] The Attorneys General of Canada and Ontario argue that the Court of Appeal erred by not taking into account the Crown's ability to elect to proceed summarily and thereby avoid the mandatory minimum sentence in the indictable offence. They argue that the hybrid nature of the offence should be taken into account as a factor when assessing the likelihood that a general application of the offence would result in a grossly disproportionate sentence being imposed. Put differently, they contend that the Crown's election to proceed summarily and thereby avoid a mandatory minimum prevents section 95 from being grossly disproportionate when the conduct is at the less serious end of the spectrum.
>
> [86] I cannot agree. To accept this argument would result in replacing a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused.

[38] This court is not doubting the exemplary conduct of the prosecution, however, the protection of an accused's fundamental rights cannot be dependent on DMP's conduct alone, particularly where the role of DMP is adverse in nature to the interests of an accused person. As Karakatsanis and Rowe J.J. wrote in the dissent, at paragraph 173 of *R. v. Stillman*, reinforcing the above principle from *Nur*, the courts are better placed to make such determinations rather than leaving it to the discretion of the prosecutor:

> As stated in *R. v. Nur* [2015] 1 S.C.R. 773, we cannot be certain that discretion will always be exercised properly, nor should the constitutionality of a legislative provision depend on the confidence that the public prosecutor will act properly

[39] As such, the constitutionality of the CDS Order 2019 cannot be corrected based on the mere presumption that the chain of command and the prosecution will execute their functions fairly and properly. The Court cannot permit what is an overbroad order that, on its face, directly infringes judicial independence and the right of an accused to a fair trial to be upheld simply based on good faith and the expectation that the conduct of the chain of command and DMP will correct it.

[40] In short, this Court has no hesitation in concluding that on its face, the CDS Order 2019 is overbroad and encroaches into the jurisdiction of the Military Judges Inquiry Committee in their specific role of commencing an inquiry as to whether a military judge should be removed from office. In his submissions, the prosecution argued that if this Court finds that this order violates the accused's section 11*(d)* right under the *Charter*, he would not be making any additional section 1 arguments.

[41] In summary, after having considered the SCC case of *Cawthorne*, I agree entirely with Pelletier M.J. that the offending CDS Order 2019 must be rescinded in order to ensure an accused's section 11*(d)* rights are protected.

Issue #2 – Did Pelletier M.J. go too far?

Context

[42] The Court summarizes the *ratio decidendi* that flows from the *Pett* case as follows:

a. Any CDS order that is focused solely on military judges in their function or role as military judges must be found of no force and effect;

b. Any CDS order that applies to all military members and officers, but in its operation, happens to capture military judges in their role as officers in the CAF, does not present the same risk and systemic concern undermining the independence of military judges.

c. The CDS Order 2019 conflicts with and undermines the statutory intention set out by Parliament in the *NDA* that military judges are to be judged by their judicial peers with respect to their judicial conduct.

d. The CDS Order 2019 is declared to be of no force and effect.

Positions of the Parties

[43] Prosecution argued that although the final outcome of the decision in *Pett* was properly determined, Pelletier M.J. went too far in his comments when he found that the only way that the section 11*(d)* rights of an accused can be appropriately protected was if the CSD does not apply to military judges.

[44] Defence argued that while the CDS Order 2019 has been brought to our attention, it is only a symptom of a larger problem. He submits that there is a systemic issue that affects both the military bench and every accused brought before the court. He argued that there are other gaps in the legislation and in spite of the specific provisions that set up a regime for the Military Judges Inquiry Committee, the legislative provisions do not provide any clarity on which disciplinary system has primacy.

[45] In the defence position, the impugned CDS Order 2019 is specifically related to the discipline of military judges, but the real infringement rises not just from the order but, from the entire regime that gives rise to the order. He submitted that the accused's rights can only be protected if this court sends a strong message, referring the issue back before Parliament.

Analysis

[46] It is important to keep in mind that this application is about the rights of the accused and not about military judges or their particular status under the CSD. However, in light of the fact that an accused person's defence in law might rely upon assertions that the chain of command may not have acted appropriately or may have

otherwise breached the accused's rights in some capacity, it is imperative to demonstrate to all serving CAF members that military judges can and do decide their cases independently from the prosecution and the chain of command.

[47] There are times when military judges must render decisions where they have no choice other than to be critical of the actions or conduct of the chain of command. An accused person needs to know that the military judge hearing his or her case is truly independent and not under any undue influence by the chain of command in any way. This level of independence requires military judges to avoid relationships with those in the chain of command as a means of promoting impartiality and to ensure that a judge's judicial independence is not compromised.

[48] Recognizing that courts martial and military judges are part of the CAF, in order to protect the rights of an accused person, it is imperative that military judges are placed in the most advantageous position to be impartial and independent.

[49] In the application before this Court, the accused argues that CDS Order 2019 on its face undermines judicial independence. In *Pett*, Pelletier M.J. succinctly captured the conflict at paragraph 116 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."

[50] In *Lippé*, the SCC concluded that the test for both "independence" and "impartiality" is that of an informed person viewing the matter realistically and practically, and having thought the matter through (see *Lippé* Headnote). However, the SCC went further with comments that inform this application:

> The facts of this case raise no "independence" problem because the Quebec Bar 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 Quebec Bar, such provisions would raise problems of judicial independence.
> [Emphasis added]

[51] In *Lippé*, the SCC made it abundantly clear that if the legislation provided for the Quebec Bar to discipline the municipal court judges in their role as judges, it would raise problems of judicial independence. These obiter comments are considered binding on lower courts such as this court martial as stated by Doherty J.in *R.* v. *Puddicombe*, 2013 ONCA 506: "In characterizing *obiter* from the Supreme Court of Canada, lower courts should begin from the premise that the *obiter* was binding."

[52] Peeling away any difference in the facts, this is the crux of the issue before this Court. Similar to the part-time municipal judges in *Lippé*, military judges hold dual roles and are accountable to two separate disciplinary regimes. In *Lippé*, the SCC acknowledged that it was not the "ideal" situation as envisaged by Dickson C.J.'s view in *Beauregard* and its guidance in *Lippé* provides critical assistance to the CAF in balancing the dual roles of military judges.

[53] In a nutshell, the provisions identified in CDS Order 2019 pertain only to military judges, specifically providing for the executive to exercise jurisdiction over them with respect to any disciplinary matter. For whatever reason, the executive took the time to explicitly craft an order for military judges. However, despite focussing on military judges in their unique role, they failed to account for the statutory regime and primacy the *NDA* assigns to the Military Judges Inquiry Committee. After considering the SCC position in *Lippé*, this Court is in substantial agreement with Military Judge Pelletier's finding that the Military Judges Inquiry Committee must have primacy with respect to any allegation that arises from a military judge's role or conduct as a military judge.

[54] Further to this, in order to achieve the appropriate independence and impartiality, Pelletier, M.J. concludes in *Pett* that an officer holding the office of military judge must be exempt from being charged under the CSD. In *Pett*, Pelletier, M.J. concludes at paragraph 146 that:

> 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.

[55] Further, the court notes that Military Judge Pelletier's comments at paragraph 147 recognize the fact that the issue before the Court is novel, and he expects that his decision will trigger follow-up discussion and recommendations. In light of that, the relief he orders is measured, recognizing that the authorities need time to consider the work that needs to be done:

> [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.

[56] Although I do not disagree with Military Judge Pelletier's proposed solution to exempt officers from being charged under the CSD while they are military judges, this court expects that any proposed solution will benefit from further study and analysis. As an example, consideration will need to be done with respect to the impact of the proposed solution when alleged breaches occur outside of Canada.

Additional Considerations

[57] Courts martial are military, portable courts specifically designed and capable of being deployed anywhere domestically and abroad. As such, military judges need to

deploy to a foreign country if required. Any solution proposed will need to consider all of the broader consequences.

[58] It is a principle of international law that each nation state has sovereignty over its own territory and domestic affairs to the exclusion of all external powers. From first principles, this means that CAF members deployed to or serving in another state automatically fall under the criminal jurisdiction of that country and Canadian police forces or tribunals are not permitted to operate without tacit agreement from the host state.

[59] For these reasons, prior to deploying CAF members, extensive efforts are always made to ensure that there is some form of legal protection regarding criminal jurisdiction afforded to CAF personnel while serving in a foreign country. Status of Forces Agreements normally assert agreement on criminal jurisdiction and establish whether domestic laws in the foreign host country will be applied or not. The existence of extraterritorial Canadian military jurisdiction is an integral part in any negotiation regarding the exercise of criminal jurisdiction. Such agreements ensure the safety of our members abroad by affording enforceable control over their behaviour and limiting the reach of repressive legislation from foreign jurisdictions.

[60] Paragraph 130 (1)(*b*) of the *NDA* extends the application of the *Criminal Code* over serving CAF members in foreign places. This principle is further buttressed by section 132 of the *NDA* that provides for jurisdiction over acts that would constitute offences under foreign law applicable in the country where the acts were committed. These provisions ensure that CAF members serving abroad can be held responsible in a Canadian Court, in any location for any allegation of an offence contrary to either Canada's or the host nation's law. Depending on the facts and the interests of the parties, based on agreement, courts martial may be held either in the host country or back in Canada.

[61] When the CAF conducts military operations in what are often failing foreign States, the ability to conduct court martial proceedings abroad is more important than ever given the challenge the United Nations has experienced in dealing with sexual misconduct. In this respect, a 2016 Secretary-General's report requested Member States "agree to establish on-site court martial proceedings, supported by the judicial infrastructure necessary, when allegations amount to sex crimes under national legislation."

[62] In light of the fact that courts martial are expected to be deployed abroad, proposed solutions must consider how the CAF would manage an allegation of misconduct by a military judge that might occur outside of Canada. This is important because subsection 6(2) of the *Criminal Code* sets out the general rule that Canadian criminal courts only have jurisdiction over criminal matters committed within the territory of Canada (see *R. v. Libman* [1985] 2 S.C.R. 178, and *Davidson v. British Columbia (Attorney General)* 2006 BCCA 447, at paragraph 5).

[63] Of course, there are exceptions to the general rule, where, with the consent of the Attorney General, courts can proceed to try such offences as sexual offences against children, or for crimes against United Nations personnel, war crimes, torture or counselling torture or offences that commenced in any territorial division in Canada (see section 7(3.7)(e), section 7(4.1), section 269.1 of the *Criminal Code*). However, it would be more likely than not that allegations would fall under the general rule. For this reason, any proposed solution should account for this type of exceptional situation to ensure that military judges are not indirectly granted impunity for offences occurring outside of Canada.

[64] The above example is provided to demonstrate that some flexibility may be needed to apply the CSD to ensure that military judges are always subject to the *Criminal Code* and the Military Judges Inquiry Commission at all times wherever they are. Under the military justice system, the CSD applies to all CAF members 24/7 in any location in Canada or abroad.

[65] In the *Pett* decision, Pelletier M.J. proposed a pragmatic solution based on existing legislation and policy. Similarly, his solution does not suggest impunity for military judges, but rather it recommends that military judges be held to account for misconduct both in civilian courts and in front of the Military Judges Inquiry Committee. In practice, under the current structure, military judges are in an untenable position where the exercise of DMP's discretion can effectively remove a military judge from judicial functions, circumventing a decision that belongs exclusively to the Governor in Council. Pelletier, M.J. highlights very succinctly the problem with the current structure:

> [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.

[66] Sadly, the above paragraph is not a theoretical or speculative assertion. There is no better way to distinguish the concern of an accused other than to apply the concept through the prism of facts. In their submissions, on consent, counsel admitted into evidence, the published decision rendered by the Military Judges Inquiry Committee on its CMAC website with respect to allegations made against the Chief Military Judge (C.M.J.). The statement dated 17 April 2016 reads:

> "The Military Judges Inquiry Committee, established in accordance with section 165.31 of the National Defence Act, reviewed a complaint against the Chief Military Judge Mario Dutil. The complaint as made by Colonel Bruce J Wakeham.

> The Complaint concerned allegations of infringement to the Defence Administrative Order and Directives (DAOD) 5019-1, Personal Relationships and Fraternization. After considering all the issues in the case, the complaint was dismissed on the basis that it did not raise any issue of judicial conduct as referred to in subsection 165.32(7) of the National Defence Act and therefore did not warrant consideration by the Military Judges Inquiry Committee."

[67] In January 2018, based on the CDS Order 2018, the earlier version of the impugned CDS Order 2019, upon receipt of DMP's legal advice, Canadian Forces National Investigation Service charged C.M.J. Dutil, forcing the said charges to be pursued within the same court martial system he oversees as Chief Military Judge, rather than in the civilian courts. DMP later preferred the charges to proceed. There is no evidence on record to suggest that DMP or the chain of command acted improperly or that DMP improperly exercised prosecutorial discretion in proceeding with charges. However, the reality is that the second order effects of the exercise of the prosecutorial discretion based on the CDS Order 2018, reinforces the point emphasized by the SCC in *Nur*. Notwithstanding a presumption that the prosecution and the chain of command will act properly, or even impeccably, their conduct alone cannot correct an otherwise unconstitutional order or policy. Based on this example, the overly broad CDS Order 2019 also sets the conditions for unintended second order effects which are unacceptable.

[68] The Military Judges Inquiry Committee has the same powers as those of a court martial, but it is set apart in that it is presided over by three more experienced appeal court civilian judges and the allegation or complaint is in respect of a judge.

[69] The purpose of the Military Judicial Inquiry Committee is to assess the alleged misconduct or shortcoming of a military judge and to determine whether a recommendation should be made to the Governor in Council that the military judge be removed from office. Based on the wording of the statement by the Military Judges Inquiry Committee, it was evident that after considering all the issues in the case, the complaint was dismissed on the basis that it did not raise any issue of judicial conduct as referred to in subsection 165.32(7) of the *NDA*.

[70] Based on the decision posted on the CMAC website, the Military Judges Inquiry Committee, composed of <u>three</u> experienced civilian appeal court judges, decided it would not make a recommendation to the Governor in Council that the C.M.J. be removed from his judicial duties. In light of this, one must question the merit, not to mention the jurisdiction (based on the SCC comments in *Lippé*) of bringing the same allegation later before a court martial to be tried by one of the C.M.J.'s more junior puisne judges.

[71] The *NDA* makes it clear that a decision to remove a judge from office belongs exclusively to the Governor in Council. Nonetheless, pursuant to the CDS Order 2018,

DMP's final decision to prefer charges against the C.M.J. combined with the decision to unilaterally pursue the charges exclusively under the military justice system had the second order effect of removing the C.M.J. from his judicial functions. When exercised, the impugned CDS Order 2019 may similarly interfere with and frustrate this intended purpose of the *NDA*.

[72] At paragraph 119 of the *Pett* decision, Pelletier M.J. emphasized the role of the court in defining the scope of DMP's jurisdiction. He writes:

> [119] As recently stated by the Supreme Court of Canada in *R. v. Stillman*, 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.
> [Footnote omitted].

[73] The reason why some direction on the scope of the military prosecution's jurisdiction with respect to military judges is helpful is due to the unique procedural modalities of the military justice process. Unlike civilian criminal courts, based on the military justice's referral and preferral process and the manner upon which courts martial are convened, most cases will not proceed before a judge until very late in the process, which is often on the eve of the *R.* v. *Jordan* 2016 SCC 27, eighteen-month deadline. Due to the late engagement by the military judiciary, courts martial are left with little flexibility for the judicial consideration of additional options.

[74] In the short term, this Court believes that the test set out in the case *R. v. Wehmeier*, 2014 CMAC 5 referred to by Pelletier M.J. at paragraph 120 of the *Pett* decision is instructive. In *Wehmeier*, the CMAC articulated a test for DMP in exercising military jurisdiction over civilians. The question before the CMAC was whether DMP should have pursued charges against a civilian in a civilian court vice through court martial under the military justice system. In its decision, the CMAC at paragraph 61 provided direction that elevated a potential violation of an accused person's *Charter* rights to be an important factor to be considered by DMP in the exercise of its charging discretion:

> [T]he issue is not whether the respondent should be prosecuted at all, but whether the interest in having him tried in the military justice system is proportional to his loss of rights when tried in that system. … In the absence of such a justification, we can only conclude that the effects of prosecuting the respondent in the military justice system are disproportionate. As a result, the respondent's prosecution is a breach of the respondent's right not to be deprived of his liberty, except in accordance with the principles of fundamental justice contrary to section 7 of the *Charter*.

[75] As the CMAC in *Wehmeier* went on to say at paragraph 62:

> We should not be taken as saying that all prosecutions of civilians before the military courts necessarily result in a breach of their rights under s. 7 of the *Charter*. Each case stands to be decided on its own facts. We would say however that where a civilian makes a s. 7

> argument based on the loss of procedural rights before the military courts, the onus shifts to the prosecution to justify proceeding before the military courts as opposed to the civilian criminal courts.

[76] In applying the CMAC test in *Wehmeier* to the situation with military judges, in light of the *Charter* concerns raised by accused persons with respect to section 11*(d)*, this court would nuance Pelletier, M.J.'s proposed solution to be a strong rebuttable presumption, rather than a general rule. In short, for those matters that fall outside the jurisdiction of the Military Judges Inquiry Committee, there must be a strong presumption that charges will be pursued in civilian criminal courts rather than in the military justice system. It is not a question about whether military judges should be prosecuted, but whether the interest in them being tried in the military justice system is proportional to the infringement or perceived infringement on an accused's section 11*(d) Charter* rights. This nuanced approach is measured and protects the independence and impartiality of the court martial process, while recognizing that military judges may still be liable in the military justice system in exceptional situations.

[77] This court proposes that to overcome the presumption, as soon as charges are laid, the onus rests with DMP to justify before a judge why it is required to bring the charges before a court martial as opposed to the civilian criminal courts. This approach is consistent with the solution recommended by Pelletier, M.J. but leaves open some flexibility for trying military judges in the military justice system for exceptional circumstances.

[78] After careful study, it is likely that the long-term solution is nested in amending the legislation to provide the Military Judges Inquiry Committee with expanded scope and jurisdiction to try a military judge charged with having committed a service offence.

[79] In light of the fact that the existing provisions in the current legal scheme under the *NDA* do not appear to be comprehensive enough, the pursuit of a long-term objective would permit Parliament to confirm its intentions with respect to whether military judge's should be held accountable under the CSD and if so, to enshrine an accused's rights to be tried by an independent and impartial tribunal by removing the chain of command and DMP from the decision-making process with respect to any charge related to a military judge.

[80] In summary, as Pelletier M.J. concluded in *Pett*, any CDS order that focusses exclusively on the discipline of military judges in their function or role must be found to be of no force and effect. In light of the fact that this application was submitted at roughly the same time as the *Pett* application, this Court exercises similar restraint. Moving forward, this Court cautions that the measured approach adopted in deciding not to terminate the proceedings against the accused will not necessarily be the status quo.

FOR THESE REASONS, THE COURT:

[81] **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.

[82] **DISMISSES** the plea in bar of trial application.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Colonel D. Martin and Major G. Moorehead, Counsel for the Respondent

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

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Relevant Evidence

The following relevant exhibits were filed with the Court:

a. Exhibit PP1-1 – Email notice of defence motion dated 18 October 2019, to adjourn, with attachments;

b. Exhibit PP1-2 - CDS Designation 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, dated 19 January 2018;

c. Exhibit PP1-3 - CDS Designation Order – Designation of Commanding Officers with respect to Certain Officers on the Strength of the National Defence Headquarters and to the Officers of the Rank of Lieutenant-General/Vice Admiral, dated 5 January 2018;

d. Exhibit PP1-4 - Canadian Forces Organization Order (CFOO) 3763 – Office of the Chief Military Judge (CMJ) dated 27 February 08 – (CPROG 3763 271200Z Feb 08)

e. Exhibit PP1-5 - Defence Written Submissions with respect to a preliminary proceeding to section 187 of the *NDA* and QR&O 112.03

f. Exhibit PP 1-6 – Respondent's Memorandum of fact and law, Section 11*(d)* of the *Charter*

g. Exhibit PP1-7 - CDS Designation 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, dated 2 October 2019;

h. Exhibit PP1-8 - CDS Order, Designation of Commanding Officers with Respect to Certain Officers and Other Ranks on the Strength of the National Defence Headquarters, dated 14 June 2019;

i. Exhibit PP 1-9 Order-Designation of Commanding Officer with Respect to service Members who are Holding the Rank of Lieutenant-Colonel or Below and Who Are on the Strength of the National Defence Headquarters, dated 28 February 1997;

j. Exhibit PP1-10 - Ministerial Organization Order 2000007, dated 7 February 2000;

k. Exhibit PP1-11 – Canadian Forces Organization Order 0002 – Canadian Forces Base Ottawa-Gatineau, dated 29 October 2019 (C PROG 291205Z OCTOBER 2019);

l. Exhibit PP1-12 - Canadian Forces Organization Order 0002 – Canadian Forces Support Unit (Ottawa) dated 8 August 2013 (CPROG 0002 091200Z AUGUST 2013); and

m. Exhibit PP1-13 - Notice issued by the Military Judges Inquiry Committee, dated 27 April 2016.