HEARING IN FRONT OF A MILITARY JUDGE

Citation: *R. v. Edwards*, 2020 CM 3006

Date: 20200814
Docket: 201965

Preliminary Proceedings

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Leading Seaman C.D. Edwards, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Lieutenant-Colonel L.-V. d'Auteuil, D.C.M.J.

REASONS ON APPLICATION MADE BY THE ACCUSED FOR A STAY OF PROCEEDINGS PURSUANT TO SUBSECTION 24(1) FOR A VIOLATION OF HIS RIGHT PURSUANT TO PARAGRAPH 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

Introduction

[1] Leading Seaman Edwards is charged with one offence of conduct to the prejudice of good order and discipline, contrary to section 129 of *National Defence Act* (*NDA*) for having used a drug, to wit cocaine, between 25 September 2015 and 23 July 2016, at or near Halifax, Nova Scotia, contrary to *Queen's Regulations and Orders for the Canadian Forces* (QR&O), article 20.04.

[2] This matter is before a court martial pursuant to an order made by the Court Martial Appeal Court (CMAC) on 31 October 2019 ordering a new trial (*R. v. Edwards*, 2019 CMAC 4).

[3] I assigned myself as the military judge to preside at this court martial on 3 February 2020. Leading Seaman Edwards filed the present preliminary application with the Office of the Chief Military Judge (OCMJ) on 11 June 2020, pursuant to section 187 of the *NDA* as a preliminary matter to be heard by the military judge assigned to preside at the court martial.

[4] The hearing of the application took place, with the agreement of the parties, on 26 June 2020 at the Asticou courtroom, in Gatineau, Province of Quebec and lasted one day.

[5] On 24 July 2020, the Court Martial Administrator signed a convening order for this charge to be dealt with by a Standing Court Martial on 18 August 2020 at the Halifax courtroom, Halifax, Nova Scotia.

[6] The applicant is claiming that the order of the Chief of the Defence Staff (CDS) (see Exhibit PP1-2) issued on 2 October 2019 regarding the designation of the officer appointed to the position of Deputy Vice Chief of the Defence Staff (DVCDS) as 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 OCMJ is a violation of his right to a hearing by an independent and impartial tribunal, in accordance with paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

[7] As such, he asked me to declare that the disciplinary regime set out in the *NDA*, as it applies to military judges, violates the constitutional principles of judicial independence pursuant to subsection 52(1) of the *Charter*, and to order a stay of the proceedings as a remedy, pursuant to subsection 24(1) of the *Charter*.

The evidence

[8] The evidence on this application is comprised of the applicant's notice in writing, the respondent's response in writing, five CDS orders, one Ministerial Organization Order (MOO) and three Canadian Forces Organization Orders (CFOO) (see the List of Exhibits at the end of the decision for more details). All these documents were introduced with the consent of both parties.

The context

[9] On 27 September 1997, the Minister of National Defence (MND) issued a MOO for the creation of the OCMJ. Under this brand new unit of the Canadian Armed Forces (CAF), all legal officers posted in the position of a military judge were put administratively together under a different unit than the one of the Office the Judge Advocate General (JAG). The OCMJ was embodied as a unit of the regular force.

[10] The legal officer appointed as the Chief Military Judge (CMJ) would act as the officer commanding a command with respect to persons on the strength of the OCMJ, except in respect of any disciplinary matters.

[11] Under section 102 of Bill C-25 *An Act to amend the National Defence Act and to make consequential amendments to other Acts* (S.C. 1998, c. 35), the CMJ who served as CMJ on 1 September 1999 and other military judges who were in office on that date, were appointed by the operation of that Act by the Governor in Council under subsection 165.21(1) of that Act. As a consequence, these military judges at the time and any other officer subsequently appointed military judge by the Governor in Council have become automatically part of the OCMJ.

[12] On 7 February 2000, the MND issued a new MOO for the OCMJ (see Exhibit PP1-8) in order to reflect the content of article 4.091 of the QR&O, which specified that the CMJ shall not exercise powers with respect to any disciplinary matter. Nothing else was modified.

[13] Pursuant to the CFOO issued for the OCMJ (see Exhibit PP1-11), the OCMJ is a unit considered as being on strength of the National Defence Headquarters (NDHQ) in Ottawa.

[14] The CDS has issued various orders in the past which designate a specific position within NDHQ as a commanding officer with respect to service members who are on the strength of the NDHQ. These orders would aim at two groups: officers (colonel or above, lieutenant-colonel or below), and non-commissioned members (private to chief warrant officer).

[15] On 19 January 2018, the CDS issued an order for the designation of commanding officers with respect to officers and non-commissioned members on the strength of the OCMJ. In this order, the officer appointed to the position of Chief of Programme was designated 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 OCMJ, and the officer appointed to the position of Commandant of the Canadian Forces Support Unit (Ottawa) would do the same towards officers other than a military judge and non-commissioned members on the strength of the OCMJ.

[16] On 2 October 2019, the CDS reissued the exact same order with a change made only to the specific name for both positions to which the officers are appointed by the CDS (DVCDS and Commandant of the Canadian Forces Base (Ottawa-Gatineau)).

[17] As confirmed by the prosecutor, and as reflected in the decision of Sukstorf M.J. in *R. v. Bourque*, 2020 CM 2008, this CDS order is still in force and applicable.

Positions of the parties

The applicant

[18] The applicant's position is that the order signed by the CDS on 2 October 2019, objectively viewed, would lead the well-informed observer to the conclusion that military judges are not sufficiently independent of the executive to fulfil the requirements of a hearing by an independent and impartial tribunal as laid out in paragraph 11(*d*) of the *Charter*.

[19] The order purports to place the DVCDS in a position of commanding officer "with respect to any disciplinary matter involving a military judge" over those military judges who belong to the OCMJ. As a practical matter, the applicant takes the position that this means all military judges.

[20] According to the applicant, the principle of institutional independence requires that military judges be free from external pressure, and even the mere threat of disciplinary consequence that can interfere not only with the judicial function itself, but the military judge's ability to exercise it at all.

[21] As such, the applicant asks the Court to conclude that his right to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter* has been, and continues to be, infringed.

[22] As a matter of remedies, the applicant requests:

(a) a declaration pursuant to subsection 52(1) of the *Charter* that the disciplinary regime set out in the *NDA*, as it applies to military judges, violates the constitutional principles of judicial independence, and is thus of no force or effect;

(b) a declaration that due to the symbiotic and interrelated roles and status of military judges as both judges and officers, only Parliament has the ability to construct a regime that would obviate the issues raised in this application; and

(c) an order pursuant to subsection 24(1) of the *Charter*, that the proceedings against the applicant be stayed due to the breach of his right to be tried by an independent and impartial tribunal as guaranteed by paragraph 11(*d*) of the *Charter*.

The respondent

[23] The respondent's position is that the designation of a commanding officer for military judges specifically for dealing with any disciplinary matter does not threaten the independence of military judges. The fact that they remain subject to the Code of Service Discipline (CSD) has no more of an adverse effect than the fact that civilian judges are liable to be charged and dealt with under the civilian criminal justice system. When charges are warranted against a military judge, there simply needs to be a mechanism for them to proceed.

[24] If the CDS order is found to infringe on paragraph 11(*d*) of the *Charter*, then it is unlawful and the Court must limit itself to make such declaration and proceed with the trial, as it was done by other military judges in *R. v. Pett*, 2020 CM 4002 and *R. v. D'Amico*, 2020 CM 2002. To the extent of the infringement, it simply ought to be ignored. Such infringement has no effect beyond the order itself. It does not bring into question the regime set out in the *NDA*.

[25] Even if the Court was to find that the disciplinary regime contained in the *NDA*, as it applies to military judges, infringes on paragraph 11(*d*) of the *Charter*, the remedies requested by the applicant are the wrong ones. At most, this court martial could declare the impugned portion of the *NDA* to be inapplicable in the context of this trial. A court martial does not have the authority to issue a declaration of invalidity pursuant to subsection 52(1) of the *Charter* that has effects beyond the case at bar.

[26] Finally, according to the respondent, a stay pursuant to subsection 24(1) of the *Charter* is not appropriate. If the tribunal is not independent, such declaration does not justify a stay. If there is an infringement that cannot be remedied, then the solution is to terminate the proceedings.

[27] Consequently, the respondent respectfully asks this court martial to dismiss the application for an order declaring that the accused's right under paragraph 11(*d*) of the *Charter* has been infringed.

Analysis

Judicial independence

[28] Paragraph 11(*d*) of the *Charter* 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.

[29] The purpose of paragraph 11(*d*) of the *Charter* is to guarantee that the process whereby the guilt of any accused will be proven is fair. An essential component of a fair process is that the trier of fact, here in this case the military judge as it is a Standing Court Martial, be independent and impartial (*R. v. Oakes*, [1986] 1 S.C.R. 103 at paragraph 32).

[30] The CMAC, once in a while, has had the opportunity to discuss the meaning of judicial independence for the military judges and the court martial. In its decision of *R. v. Lauzon*, CMAC-415, issued on 18 September 1998, it has referred to a number of principles that are still really relevant today to a proper analysis of the issue raised by the applicant. It goes as follows from paragraphs 10 to 19 of this decision:

> [10] A number of principles applicable to the instant case on the subject of judicial independence, which is protected by section 11(*d*), emerge from the following cases: *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *R. v. Lippé*, [1991] 2 S.C.R. 114; *R. v. Généreux*, [1992] 1 S.C.R. 259; *2747-3174 Québec Inc. v. Quebec (Régie de permis d'alcool)*, [1996] 3 S.C.R. 919 and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. It is worthwhile to review them briefly.

> [11] First, judicial independence is a concept which is distinct from but closely related to impartiality. Impartiality refers foremost to an absence of prejudice or bias, actual or perceived, on the part of a judge in a particular case, but like independence it includes an institutional aspect. If the system is structured in such a way as to create a reasonable apprehension of bias at the institutional level, the requirement of impartiality is not met. Independence is based on the existence of a set of objective conditions or guarantees which ensure judges have the complete freedom to try the cases before them. It is more concerned with the status of the Court in relation to the other branches of government and bodies which can exercise pressure on the judiciary through power conferred on them by the state.
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> [12] Second, there are two dimensions to judicial independence: the individual independence of a judge and the institutional or collective independence of the Court to which the judge belongs.
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> [13] Third, institutional independence must not be confused with administrative independence. The latter refers to the ability of the Court to make administrative decisions which bear directly and immediately on the exercise of the judicial function. On the other hand, institutional independence derives from the role of the courts as constitutional organs and protectors of the Constitution and of the fundamental values enshrined therein. It plays a role in the separation of powers and protects against abuses on the part of the Executive as well as, in a federal system, against interference by the legislative power. It also protects against interference by the parties to a case and by the public in general. In the Canadian system of military justice, it refers to the ability of the institution of military justice to make decisions free from any political pressure as well as the public's perception of that institution and of its ability to act freely from such pressure.
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> [14] Fourth, the three core characteristics of judicial independence are security of tenure, financial security and administrative independence.
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> [15] Fifth, the core characteristics of judicial independence can have both an individual dimension and an institutional or collective dimension.
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> [16] Sixth, financial security is one of these characteristics which has both an individual dimension and an institutional dimension.
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> [17] Seventh, judicial independence serves important societal goals such as the maintenance of public confidence in the impartiality of the judiciary and the rule of law.
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> [18] Eighth, whether or not a court enjoys judicial independence is measured according to the perception of a reasonable and informed person. In other words, the Court must ask itself what such a person - viewing the matter realistically and practically - would conclude.
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> [19] Lastly, criminal prosecutions brought before a Court Martial attract the protection offered by section 11(*d*) of the Charter to any accused person. We hasten to add that in exercising this jurisdiction, Courts Martial apply the Charter rights and guarantees and use the powers granted under section 24 of that Charter. In other words, they play an important role in the application of the principles of the Constitution and the protection of the values included therein.

[31] To these principles, I would like to add that the guarantee of judicial independence is for the benefit of the judged, not the judges (*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, at

paragraph 329, *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, at paragraph 28), which means that in the military justice system, judicial independence of the military judge is for the benefit of the person subject to the CSD who is tried by a court martial, not the military judge.

[32] The three core characteristics of judicial independence as identified by case law, security of tenure, financial security and administrative independence, were implemented by Parliament regarding judicial independence of military judges 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.

[33] Concerning financial security, the establishment of a Military Judges Compensation Committee in the QR&O in September 1999 and its transfer later in 2013 in the *NDA* seems to have answered to this day the shortcomings identified in 1998 by the CMAC decision in *Lauzon*.

[34] Regarding administrative independence, the creation of the OCMJ as a unit of the CAF in 1997, where only military judges and the personnel exclusively devoted to support the court martial were put together, with the Court Martial Administrator assuming a quasi-judicial role and administrative functions vis-à-vis human resources and financial responsibilities for this office, seem to have met, to this day, this characteristic of judicial independence.

[35] About security of tenure, starting on 1 September 1999, the appointment by the Governor in Council of a military judge was then for a term of five years and this function was eligible to be reappointed on the expiry of a first or subsequent term. However, some courts' decisions, especially the one made by the CMAC in *R. v. Leblanc*, 2011 CMAC 2, led to some amendments by Parliament to the *NDA* in 2011 and to various provisions of the regulation in order to reflect that a military judge holds office during good behaviour, and ceases to do so on being released at his or her request from the CAF or on attaining the age of 60 years.

[36] As mentioned by the CMAC in *Leblanc* at paragraph 52, judicial independence is for the benefit of the judged, as it is important for the accused person that the military judge not be, and not appear to be, beholden to the chain of command and that his or her institutional independence provides the accused with the assurance of a fair and equitable trial.

[37] It must be mentioned that since 1 September 1999, the *NDA* provides that a military judge is appointed by the Governor in Council. It is also since that same date that the *NDA* provides that a military judge may be removed by the Governor in Council for cause on the recommendation of the Military Judges Inquiry Committee.

The Military Judges Inquiry Committee

[38] I had the benefit of reading the decision of my colleague Pelletier M.J. in *Pett*, and more specifically his remarks at paragraphs 89 to 104 concerning the Military

Judges Inquiry Committee. I cannot agree more with him on this specific subject, especially with his conclusion at paragraph 104 that:

> [F]rom 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.

[39] As officers holding the office of military judge are accountable for their conduct under the CSD, the Military Judges Inquiry Committee fulfils this requirement for a specific mechanism reviewing their conduct for this purpose, totally independent from the legislative and executive branch, which would include being independent from the regime in the CSD dealing with a service offence for other CAF officers, all this in accordance with the principle of judicial independence. This is exactly what Parliament has tried to achieve through the *NDA* provisions by enacting the Military Judges Inquiry Committee (sections 165.31 and 165.32).

[40] As the establishment of the Military Judges Compensation Committee was made in order to reflect the characteristic of financial security, the Military Judges Inquiry Committee was established by Parliament in order to reflect the characteristic of security of tenure related to the principle of judicial independence embodied in the Constitution of Canada.

[41] Consequently, any CAF officer holding the office of military judge shall see his or her conduct reviewed by the Military Judges Inquiry Committee.

[42] I have also had the benefit of reading the decision of my colleague Sukstorf M.J. in *D'Amico*. I agree with her and Pelletier M.J. in *Pett* that the Military Judges Inquiry Committee set by the CSD does exempt officers from being dealt with the regime in the CSD dealing with a service offence while they are military judges.

[43] I find it difficult that such situation may suffer any exception. I agree with my colleagues that a military judge is a regular force CAF officer. However, it would be impossible in practice to determine if the military judge's conduct in question relates exclusively to the one of a CAF officer for allowing the application of the regime in the CSD dealing with a service offence. As a matter of reality, as both functions relate to the professional and personal behaviour of the individual who is a CAF officer holding the office of military judge, it often makes it very difficult to distinguish between the CAF officer and the military judge's conduct when both functions are performed by the very same person. Both are calling for the application of similar ethical principles and values, but with a very different purpose. As an officer is related to the profession of arms, a military judge has to consider the impact of his or her conduct in relation to judicial independence at all time. It just illustrates how it could be difficult for a well-informed observer to make the proper distinction for understanding if it is the military

judge or the CAF officer who is the subject of the regime in the CSD dealing with a service offence.

[44] Second, the regime in the CSD dealing with a service offence continues to be administered primarily by the chain of command. As a matter of fact, a commanding officer has the ability to order an investigation (Chapter 106 of the QR&O) and lay a charge (Chapter 107 of the QR&O), or to delegate all these functions to a subordinate in the unit. A commanding officer also has the responsibility to decide to proceed or not with the charge (Chapter 108 of the QR&O), notwithstanding if it is a member of the unit or a Canadian Forces National Investigation Services investigator laying the charge. As a matter related to a service offence is initially decided to be dealt with by a hierarchal authority superior in rank to the one held by any CAF officer holding the office of military judge, which would include the CMJ, then essentially, it would mean that a person in authority from the executive is put in a position to potentially exercise some form of coercion against a military judge. Such situation does not make a military judge as free as possible from the interference of the members of the military hierarchy in the eyes of a well-informed observer.

[45] I would agree with my colleagues Pelletier and Sukstorf M.JJ. that despite the fact that any charge laid pursuant to the CSD against a military judge will necessarily be referred to the Director of Military Prosecutions, judicial independence for military judges cannot and shall not rely on how prosecutorial discretion will be exercised (*Pett,* paragraph 74 and *D'Amico,* paragraph 38). In addition, the recent CMAC decision in *R. v. Banting*, 2020 CMAC 2, where the court considered the prosecution and the subsequent appeal, to have been questionable as it was apparent that military commanders and the prosecution intended to use Lieutenant Banting's circumstances to test the limits of the CMAC's reasoning from some other previous decisions, while the court martial concluded that there existed no *prima facie* case, does bring some kind of practical reality to that point.

[46] Third, to give effect to security of tenure as a characteristic of judicial independence in the context of a court martial presided by a military judge, it appears that for dealing with the conduct of an officer holding the office of military judge, the Military Judges Inquiry Committee must take precedence over the regime in the CSD dealing with a service offence, as decided by Pelletier M.J. Allowing the regime in the CSD dealing with a service offence regulating the conduct of military judges would defy Parliament's intent as expressed in the *NDA* through the implementation of mechanisms to ensure judicial independence, which includes the characteristic of security of tenure, and will impact on the confidence the public and persons subject to the CSD must have in the independence and impartiality of military judges.

[47] In a totally different matter, a Federal Court judge has recently had the opportunity to review the court martial decisions of *Pett* and *D'Amico*. In *Canada (Director of Military Prosecutions)* v. *Canada (Office of the Chief Military Judge)*, 2020 FC 330, at paragraph 38, Martineau J. concluded:

> As can be seen above, the existence of an independent inquiry system of the conduct of military judges is such that it strengthens the institutional independence of the Office of the Chief Military Judge.

[48] Then, I conclude that the enactment of the provisions on the Military Judges Inquiry Committee by Parliament has had the effect of proscribing the application of the regime in the CSD dealing with a service offence towards military judges.

[49] The prosecution, as have some other persons, argued that if the regime in the CSD dealing with a service offence could not find any application to military judges, then they would potentially be considered as being above the law, considering they would not be accountable for their actions pursuant to the CSD.

[50] It must be noted that the Military Judges Inquiry Committee is an integrant part of the CSD. The related *NDA* provisions (sections 165.31 and 165.32) are in Division 6 – Trial by Court Martial, under Part III – Code of Service Discipline. Then it can be said that the CSD applies to military judges, but in a different manner, as the Military Judges Inquiry Committee was created to give a full application to the principle of judicial independence.

[51] In addition, I make mine the remarks of Pelletier M.J. in *Pett* at paragraph 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. 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*. 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.

[52] I would agree with Sukstorf M.J., as she expressed it in *D'Amico* that, in theory, there may potentially exist very rare situations where the regime in the CSD dealing with a service offence may find applications towards a military judge, as long as he or she is involved exclusively as a CAF officer. However, as I said previously, because it is very difficult to distinguish between the CAF officer and the military judge when both functions are performed by the same individual, I would agree that the approach taken by Pelletier M.J. in *Pett* to the effect that the executive should refrain from trying in any way to apply the regime in the CSD dealing with a service offence to a military judge, is obviously more in line with the legislative position expressed and taken by the Parliament in the *NDA* for a different disciplinary regime concerning military judges, in order to give full effect to their judicial independence.

[53] In short, as some provisions of the *NDA* in the CSD call for the application of a different disciplinary regime to deal with the conduct of the military judges in respect of the principle of judicial independence, then it clearly does not make military judges above the law.

[54] In other words, it is not because a CAF officer is transferred from the executive branch to the judicial branch due to a Governor in Council appointment as a military judge that this situation makes such a person unaccountable for his or her actions under the CSD. To the contrary, a military judge remains accountable for his or her actions in a way that respects the principle of judicial independence, which exists for the benefit of the persons subject to the CSD, as intended by Parliament and reflected by the applicable provisions in the *NDA*.

The alleged violation

[55] Now, is the order of the CDS issued on 2 October 2019 regarding the designation of the officer appointed to the position DVCDS as 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 OCMJ a violation of the right of Leading Seaman Edwards to a hearing by an independent and impartial tribunal in accordance with paragraph 11(*d*) of the *Charter*?

[56] The very purpose of this order is to specifically provide the legal authority to a commanding officer towards each military judge for applying the regime in the CSD dealing with a service offence.

[57] The practical effect of such situation is that the CDS particularly targeted military judges while another disciplinary regime, which is the Military Judges Inquiry Committee, is preferred for them by the legislator.

[58] As a result, I conclude that a reasonable and informed observer, viewing the matter realistically and practically would conclude that the CDS order issued on 2 October 2019, and the one issued previously on 19 January 2018, is clearly an attempt to extend to the military judges the regime in the CSD dealing with a service offence, despite the provisions in the *NDA* on the Military Judges Inquiry Committee having the effect of proscribing such thing. In addition, it raises concerns regarding the confidence of the public and the persons subject to the CSD in the impartiality of the military judiciary as part of judicial independence.

[59] As the military judges in *Pett* and *D'Amico*, I conclude that the impugned order violates judicial independence and constitutes an infringement to the right of Leading Seaman Edwards to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter*.

Justification under section 1 of the Charter

[60] Given the vital role played by judicial independence in the Canadian constitutional structure, the standard application of section 1 of the *Charter* cannot

alone justify an infringement of that independence. It can only be justified where there are "dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy", and a government must present convincing evidence to justify such infringement (*Mackin v. New Brunswick (Minister of Finance),* [2002] 1 S.C.R. 405 at paragraphs 72 and 73; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General),* 2016 SCC 39).

[61] As a matter of fact, the prosecution did not adduce any evidence that could justify an infringement and made no submission on this issue.

The remedy

[62] In the decision of *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3, the Supreme Court of Canada said at paragraphs 24 and 25:

> 24 The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights (*R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*")). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:
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> > [Section] 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures the attainment of its objects. . . . Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation . . . . Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "(n)arrow and technical" reading of the provision . . . . [Reference omitted.]
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> 25 Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Dunedin*, *supra*, at paras. 19-20). A purposive approach to remedies in a *Charter context* gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies. [Emphasis in original]

[63] Then, what would be a responsive and effective remedy in the circumstances?

[64] The prosecution suggested that if the Court comes to the conclusion that the CDS order violates the right of the accused to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter*, then the proper remedy would be

the one decided by my colleagues in *Pett* and *D'Amico*, which is to declare that the CDS order 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. Then the court martial would be in a position to proceed.

[65] As mentioned by defence counsel, my colleagues made that decision in applying judicial restraint as it was a novel issue for the court martial. In *Pett*, Pelletier M.J. expressed his judicial restraint in these terms at paragraphs 145 to 147:

> [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.
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> [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 advisers 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.

[66] In *D'Amico*, Sukstorf M.J. also expressed judicial restraint on the same issue in these terms at paragraph 80:

> [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.

[67] I agree that in the specific circumstances my colleagues found themselves, such remedy appeared as being the most responsive and effective at the time.

[68] However, some time has passed since these decisions were delivered. The latest one, which is *D'Amico*, was rendered on 21 February 2020. Since then, nothing else has happened regarding the CDS order despite the decisions made in *Pett* and *D'Amico*.

[69] As Pelletier M.J. mentioned it in *Pett*, my understanding is that military authorities and their legal advisors have had time to consider the issue and the legal response provided by the court martial for conducting their affairs accordingly about this specific legal issue. Obviously, whether it be at the time of the hearing for this application or even today, the result is the same: the impugned CDS order has not been rescinded. Interestingly enough, Sukstorf M.J. very recently made the same factual conclusion in her decision in *Bourque*, rendered on 10 July 2020.

[70] It can certainly be inferred from these circumstances that there is no intent, whatsoever, from the CDS, as part of the executive branch, to even try to correct the situation. No evidence was offered on this issue. It is with certainty that I conclude that the public confidence, which includes the one of persons subject to the CSD, could be undermined in relation to military judges' independence and impartiality in these circumstances, considering that the executive has not even considered taking any action to ensure the maintenance of the rule of law and to preserve the accused's right to a fair trial before an impartial and independent tribunal, despite courts martial decisions on this issue.

[71] It appears obvious to the Court that the suggestion made by the prosecution to apply a remedy as the one in *Pett* and *D'Amico* would appear meaningless in the circumstances, as it would be no more responsive and effective in the circumstances.

[72] Judicial independence is a matter of trust. As mentioned by the CMAC at paragraph 17 of *Lauzon*, it "serves important societal goals such as the maintenance of public confidence in the impartiality of the judiciary and the rule of law."

[73] The prosecution submitted to the Court that if it does not want to declare the CDS order to be of no force or effect and proceed with the trial, then the Court should consider terminating the proceedings.

[74] Any remedy putting an end to the trial must be assessed by this Court in balancing the state interests to have serious offences being tried on their merits with the rights of the applicant to have a fair trial.

[75] The use of cocaine by a CAF member is considered a serious offence in the context of an armed force. The CMAC articulated clear reasons why the involvement with drugs in a military environment must be treated as a very serious matter. In 1985, in its decision of *R v MacEachern*, (1986) 24 CCC (3d) 439, at page 444, the Court said:

> Because of the particularly important and perilous tasks which the military may at any time, on short notice, be called upon to perform and because of the team work required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating their use may be more pressing than that of civilian authorities.

[76] As mentioned by the Federal Court in *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)* at paragraph 33:

> It is also 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 (*R v Généreux*, [1992] 1 SCR 259 at paragraphs 83, 98 [*Généreux*]). The issue of independence of courts martial and military judges is a complex issue which has generated much debate since 1992, and which still exists in 2020: public trust, and especially that of military personnel, towards the military justice system rests on, among other things, the independence of the Office of the Chief Military Judge.

[77] The necessity of maintaining the impartiality of military judges, as a component of judicial independence, supersedes foremost the one to proceed with the charge in the circumstances, even though I consider them as serious. No compromise can be made regarding judicial independence of military judges, and as such, putting an end to this trial appears to the Court as a very responsive in the circumstances.

[78] However, it does not appear as being an effective remedy to the Court. By terminating the proceedings, it clearly allows it to be convened again. As courts martial have been convened since the issuance of the decisions of *Pett* and *D'Amico*, it appears that the CDS has not seen the need to correct the situation following the issuance of these decisions and, surely, this situation continues to exist. If the court terminates the proceedings regarding the court martial of Leading Seaman Edwards, the situation could remain the same as the court martial can be reconvened without having the CDS order being rescinded, perpetuating the current situation.

[79] In addition, it could contribute to delaying the proceedings, especially considering that this court martial is a new trial ordered by the CMAC for an alleged incident that would have occurred in 2015-2016. I do not think it is appropriate to add more delay in the circumstances of the case, especially knowing that it will not make any difference on the respect of the right of Leading Seaman Edwards to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter*.

[80] Then, the Court is left with the suggestion by Leading Seaman Edwards to stay the proceedings before this Court.

[81] A stay of proceedings is appropriate as a last resort in the clearest of cases, as mentioned in the Supreme Court of Canada decisions of *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paragraph 68, and in many other subsequent decisions from the same court.

[82] The test consists of three requirements (*R. v. Babos*, 2014 SCC 16 at paragraph 32). It goes as follows:

(a) the prejudice must be manifested, perpetuated or aggravated through the conduct of a trial or by its outcome;

(b) no other remedy can redress the prejudice, and

(c) where the first two inquiries leave uncertainty, a balancing of the interests in favour of granting a stay against the interest that society has in making a final decision on the merits weighs in favour of a stay.

[83] The infringement of the right of Leading Seaman Edwards under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal will continue to be manifested, perpetuated, and especially aggravated if the Court proceeds with the charge, as the issue of the independence of the military judge presiding at his court martial remains entirely, or if the matter is reconvened and proceed.

[84] The only way to resolve the matter is having the CDS rescind his order about the military judges, which has not been done to this day. As such, no other remedy can redress the prejudice.

[85] Considering the vital and crucial role played by judicial independence in the Canadian constitutional structure and in the military justice system concerning courts martial, the interest of Leading Seaman Edwards to a hearing by an independent and impartial tribunal does clearly outweigh the interest the society has in obtaining a final decision on the merits of the case. There is no other way to maintain the public trust and the confidence of persons subject to the CSD towards judicial impartiality, and as such, judicial independence of military judges. Consequently, I conclude that a stay of proceedings is appropriate as a last resort in the clearest of cases.

[86] Considering my comments regarding the Military Judges Inquiry Committee, there is no need to make any declaration, as suggested by the applicant, about the constitutionality of the disciplinary regime set out in the *NDA* and the role Parliament should play towards it.

FOR ALL THESE REASONS, I:

[87] **GRANT IN PART** the application made by Leading Seaman Edwards.

[88] **DECLARE** that the right of Leading Seaman Edwards under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal has been violated.

[89] **DIRECT** that, pursuant to subsection 24(1) of the *Charter*, the proceedings of this Standing Court Martial in respect of Leading Seaman Edwards convened on 18 August 2020 be stayed.

Counsel:

Captain C. Da Cruz and Major A. H. Bolik, Defence Counsel Services, Counsel for Leading Seaman C.D. Edwards

The Director of Military Prosecutions as represented by Lieutenant-Colonel D.G.J. Martin and Major M.L.P.P. Germain

List of Exhibits

The following exhibits were filed with the Court:

(a) PP1-1 Twelve-page document, APPLICATION FOR HEARING OF A PRELIMINARY PROCEEDING PURSUANT TO SECTION 187 *NATIONAL DEFENCE ACT* AND QR&O 112.03;

(b) PP1-2 Two-page document, CDS 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, 2 Oct 2019;

(c) PP1-3 Seventeen-page document, RESPONDENT'S MEMORANDUM OF FACT AND LAW SECTION 11(*d*) OF THE *CHARTER OF RIGHTS AND FREEDOMS*;

(d) PP1-4 Two-page document, CDS 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, 19 Jan 2018;

(e) PP1-5 Three-page document, CDS 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, 5 Jan 2018;

(f) PP1-6 One-page document, CDS Order, Designation of Commanding Officers 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, 28 Feb 1997;

(g) PP1-7 Four-page document, CDS Order, Designation of Commanding Officers with respect to certain officers and other ranks on the strength of the National Defence Headquarters, 14 June 2019;

(h) PP1-8 One-page document, Ministerial Organization Order 2000007, [Office of the Chief Military Judge], 7 Feb 2000;

(i) PP1-9 Six-page document, Canadian Forces Organization Order 0002 – Canadian Forces Base Ottawa-Gatineau, 29 Oct 2019;

(j) PP1-10 Five-page document, Canadian Forces Organization Order 0002 – Canadian Forces Support Unit (Ottawa), 23 May 2013; and

(k) PP1-11 Two-page document, Canadian Forces Organization Order 3763 Office of the Chief Military Judge, 27 Feb 2008.