COURT MARTIAL

Citation: *R. v. Iredale*, 2020 CM 4011

Date: 2020917
Docket: 201970

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Captain M.J. Iredale, Applicant

- and -

Her Majesty the Queen, Respondent

Application heard and decision rendered in Gatineau, Quebec, on 11 September 2020.
Written reasons delivered in Gatineau, Quebec, on 17 September 2020.

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by General Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "D.R.", shall not be published in any document or broadcast or transmitted in any way.

FINDING ON A DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS

Introduction

[1] Captain Iredale is an officer serving part time in the Cadet Organizations Administration and Training Service. He was initially charged by an officer from the military police on 22 May 2019 with three offences of disgraceful conduct and three other offences of conduct to the prejudice of good order and discipline under sections 93 and 129 of the *National Defence Act* (*NDA*) respectively, in relation to alleged improper behaviour of a sexual nature, consisting of sexually touching and inappropriate words directed at another adult officer. On 17 December 2019, six charges were ultimately preferred for trial by court martial by a representative of the

Director of Military Prosecutions (DMP). The three initial charges of sexual touching on three distinct occasions were converted to charges of sexual assault and the three charges of conduct to the prejudice of good order and discipline remained as initially laid.

[2] This General Court Martial commenced its proceedings at Canadian Forces Base Esquimalt on 22 June 2020 with hearings and determinations pertaining to two applications filed by the defence. These applications were dismissed. A prosecution motion to dismiss another defence application for abuse of process was heard on 23 June 2020 and granted with reasons provided in writing on 16 July 2020. The trial is set to commence before the panel of the General Court Martial on 28 September 2020.

[3] On 23 June 2020, in the wake of similar applications heard in the cases of Leading Seaman Edwards and Captain Crépeau on 26 and 29 to 30 June 2020 respectively, counsel for the accused notified the Court of his intent to submit an application for a stay of proceedings on the basis that the right of Captain Iredale to be tried by an independent and impartial tribunal is infringed by both an order from the Chief of the Defence Staff (CDS) dated 2 October 2019 and provisions of the *NDA* resulting in military judges being subject to the disciplinary regime applicable to Canadian Armed Forces (CAF) officers. During a teleconference with counsel on 2 September, deadlines were set for the submission of written arguments and material to allow this application to be heard at the Asticou courtroom in Gatineau on 11 September 2020.

[4] The hearing was conducted as scheduled. It was attended by Captain Iredale remotely, given the current sanitary situation, while his and two of the prosecution's counsel appeared in person, and a third prosecution counsel appearing remotely. At the close of the hearing, following a short recess, the Court announced that the application was granted in part and ordered a stay of proceedings with reasons to follow. These are the Court's reasons which crystallize its decision as it was made on 11 September 2020, without consideration for any subsequent change in circumstances.

Evidence

[5] The evidence submitted by consent of the parties consists of a copy of the Record of Disciplinary Proceedings reflecting the charges initially laid against the applicant, an Agreed Statement of Facts describing the circumstances of the offences alleged and a number of exhibits which are the same as those presented in similar cases. These include a copy of the impugned order of 2 October 2019 by the CDS, copies of previous CDS orders of a similar nature, as well as Canadian Forces Organizational Orders (CFOOs) and Ministerial Organizational Orders (MOOs) applicable to the Office of the Chief Military Judge, the Canadian Forces Support Unit Ottawa or its successor Canadian Forces Base Ottawa-Gatineau and other units and elements of the CAF. The notices of appeals in the matters of both *Crépeau* and *Edwards* were also entered as exhibits.

[6] I have also engaged counsel on those facts and matters contained in *Military Rules of Evidence* 15 and 16 on required and discretionary judicial notice and neither formulated any objections to the Court taking these matters under judicial notice as required.

Background of the current application

[7] As alluded to above, this application is not new. On 2 October 2019, the CDS issued an order designating the officer appointed to the position of Deputy Vice Chief of the Defence Staff (DVCDS) to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge (the impugned CDS order).

[8] Shortly thereafter and roughly at the same time, two similar applications were received by the court administration in the cases of Master-Corporal Pett and Corporal D'Amico, alleging that the CDS giving disciplinary power over military judges to the executive impugns judicial independence in a manner which cannot be sufficiently remedied by the institutional background of the military judiciary, thereby violating accused's right to be tried before an impartial and independent tribunal as guaranteed at paragraph 11(d) of the *Canadian Charter of Rights and Freedoms (Charter).*

[9] In written reasons released on 10 January 2020 in *R v. Pett*, 2020 CM 4002, I found that the impugned CDS order indeed generated a violation of the right held by accused persons facing courts martial to be tried before an impartial and independent tribunal as it targets military judges directly as subject of the disciplinary regime applicable to officers of the CAF, without due consideration to the Military Judges Inquiry Committee, the mechanism provided for in the Code of Service Discipline (CSD) to address allegations of misconduct involving military judges. I found that this important safeguard was undermined by the impugned CDS order to the extent that a reasonable person fully informed of all the circumstances would consider that military judges do not enjoy the necessary guarantees of judicial impartiality. Having found a violation, I decided that the appropriate remedy was a formal pronouncement, under the authority of section 179 of the *NDA*, declaring the impugned CDS order to be unlawful and of no force or effect. I held that such a declaration, combined with the findings in my decision as it pertains to the limits in the application of the disciplinary regime of the CSD to an officer also holding the office of military judge, was in my opinion sufficient to alleviate the perception that the court martial might be anything less than an independent and impartial tribunal. I then dismissed the application and exercised the Court's jurisdiction over Master-Corporal Pett, ultimately finding him guilty as charged and sentencing him to a reprimand and a fine in the amount of $1,500.

[10] About six weeks later in *R. v. D'Amico*, 2020 CM 2002, my colleague Sukstorf M.J., arrived at the same conclusion and remedies as I had in *Pett*, also finding that the impugned CDS order, which had not been repealed, was of no force or effect. Agreeing with the declaratory remedy imposed in *Pett*, she allowed the trial she was presiding to continue before the panel of a General Court Martial.

[11] As noted at paragraphs 66 to 71 of *D'Amico*, the role of the Military Judges Inquiry Committee and its interaction with the disciplinary regime applicable to officers had a practical application as it pertains to the then on-going prosecution of the Chief Military Judge, Colonel Dutil, before a court martial. The military judge presiding that trial, d'Auteuil M.J., granted an application by the defence to recuse himself (*R. c. Dutil*, 2019 CM 3003) and, in his capacity as judge delegated with the authority to appoint judges to preside courts martial, refused to appoint

any other judge to preside over the trial. At the time the *Pett* and *D'Amico* decisions were rendered, Martineau J. of the Federal Court was deliberating on an application by the DMP for judicial review of the decision by d'Auteuil M.J. not to appoint another military judge to preside the Dutil trial, thereby placing the prosecution of the Chief Military Judge at a dead end. In a comprehensive decision which referred extensively to *Pett* and *D'Amico*, Martineau J. dismissed the application of the DMP for judicial review on 3 March 2020 in *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330. A week later, on 11 March 2020, the DMP announced in a press release that he was withdrawing the charges against Colonel Dutil in consideration, amongst other factors, of the Federal Court decision.

[12] Master-Corporal Pett appealed the findings made in his court martial, presumably as it relates to the decision not to terminate or stay the proceedings against him. However, the appeal was discontinued on 23 April 2020.

[13] After applications similar to this one were heard in the cases of Leading Seaman Edwards and Captain Crépeau on 26 and 29 to 30 June 2020 respectively, another accused, Major Bourque, filed a Notice of Application on 6 July 2020, seeking to submit the same application ahead of his trial scheduled to commence on Monday, 13 July 2020.

[14] The prosecution's objection to the hearing of Major Bourque's application was rejected by my colleague Sukstorf M.J. on Friday, 10 July 2020. At paragraph 34 of a written decision found at *R. v. Bourque*, 2020 CM 2008, my colleague expressed her concern in relation to the inefficiencies in the administration of justice brought by the failure to give effect to the declarations of invalidity made in both *Pett* and *D'Amico*, specifically the failure to have the impugned CDS order of 2 October 2019 rescinded. In her opinion, the cancellation of the impugned CDS order was required to allow courts martial to carry on their work without the need to address repeated applications alleging their lack of independence and impartiality. She decided to postpone the hearing of Major Bourque's application until 1330 hours on Monday, 13 July 2020 to allow the required time for the impugned CDS order to be rescinded and the trial to proceed. She directed that if the order was still valid at that time, she would expect explanations to be provided as to why. Sukstorf M.J. added that she expected the legal advisors to the Office of the Judge Advocate General (OJAG) to render legal advice consistent to the law set in *Pett* and *D'Amico* to the effect that the order is unlawful. As it turned out, on 13 July 2020 Major Bourque withdrew his application and agreed to plead guilty in exchange for a fine of $200, the result of a resolution agreement and joint submission which was ultimately agreed to by my colleague.

[15] The arguments heard in the Leading Seaman Edwards and Captain Crépeau matters generated two decisions, both rendered on 14 August 2020 and published as *R. v. Edwards*, 2020 CM 3006 and *R c. Crépeau*, 2020 CM 3007. My colleague d'Auteuil M.J. granted both applications in part and ordered a stay of proceedings undertaken against both accused. The only distinction between these two cases is how the applicants characterized their demands as it pertains to the required findings relating to the constitutional validity of the disciplinary regime set out in the *NDA* as it applies to military judges. In *Edwards*, the applicant demanded that this regime be declared of no force or effect, while in *Crépeau*, as in this case, the applicant requested a declaration of constitutional invalidity of sections 12, 18 and 60 of the *NDA*, in

addition to demanding as a subsidiary remedy, a declaration of invalidity of the impugned CDS order. In both cases, the decision was to refuse to grant declarations of unconstitutionality of the regime or specific sections of the *NDA* impugned while declaring that the accused's right under paragraph 11(d) of the *Charter* to a hearing before an independent and impartial tribunal had been violated.

[16] In addition, less than 24 hours before this application was heard, my colleague d'Auteuil M.J. released another decision in the case of *R. c. Fontaine*, 2020 CM 3008 in which he once again ordered a stay of proceedings against the accused-applicant and declared that the impugned CDS order violated the right of the applicant to a hearing before an independent and impartial tribunal. The particularity of *Fontaine* is that it involved three charges under section 130 of the *NDA*, referring to offences under the *Controlled Drugs and Substances Act* as opposed to the purely military offences in *Edwards* and *Crépeau*. As mentioned, this case concerns charges laid against Captain Iredale alleging three purely military offences and three charges under section 130 of the *NDA* referring to sexual assault under the *Criminal Code*.

[17] The decisions of my colleague in *Edwards* and *Crépeau* are currently being appealed at the Court Martial Appeal Court (CMAC), as indicated by the two notices of appeal filed as exhibits. I have been told by prosecution counsel at the hearing that the decision of my colleague in *Fontaine* would also be appealed. I have also been advised that a cross-appeal was filed in the cases in *Edwards* and *Crépeau* targeting the decision not to issue a declaration of unconstitutionality of the legislation governing the liability of military judges under the disciplinary scheme applicable to officers.

Position of the parties

Introduction: the issues

[18] Given the background that I have just summarized, counsel for the parties have recognized that there was little to gain in restating at length the arguments made before me in *Pett* and those heard by my colleagues who have heard similar applications since. Indeed, all of the court martial decisions made so far pertaining to judicial independence and impartiality in relation to the impugned CDS order have been based on the findings in *Pett* and arrived at the same conclusion, to the effect that the right of an accused to be tried by an independent and impartial tribunal protected by paragraph 11(d) of the *Charter* is infringed by that order. If I was to rule on this application anew, three questions would have to be answered: first, whether paragraph 11(d) of the *Charter* is infringed by the impugned CDS order; second, whether sections 12, 18 and 60 of the *NDA* infringe paragraph 11(d) of the *Charter*; and finally, if there is a violation of the *Charter*, what is the proper remedy?

[19] The reasons in *Pett* address these three questions. Therefore, counsel submissions were focussed on whether *Pett* should be revisited, with particular attention to the issue of whether the passage of time, since *Pett* was rendered on 10 January 2020, combined with the fact that the CDS order still has not been rescinded, now requires that a stay of proceedings be ordered, as was done in the cases of *Edwards*, *Crépeau* and *Fontaine*.

The applicant

[20] Counsel for Captain Iredale submits that *Pett* did not go far enough in its findings as it pertains to what causes the violation of an accused person's right to be tried by an independent and impartial tribunal when appearing before a court martial. Although the applicant agrees that the impugned CDS order in itself generates sufficient perception concern to justify a finding that the right to be tried by an independent and impartial tribunal has been infringed, he adds that the legislative framework which allows or requires this order to be issued is also at fault, hence his request that sections 12, 18 and 60 of the *NDA* be declared unconstitutional as they render every military judge incapable of being, or appearing to be, independent and/or impartial when presiding a court martial.

[21] As it pertains to remedies, the applicant submits that a declaration to the effect that the impugned CDS order and sections 12, 18 and 60 of the *NDA* are of no force or effect would not be sufficient to alleviate the violation of Captain Iredale's *Charter* rights in light of the uncertainty and timeline for a resolution of this matter. Only a stay of proceedings ordered pursuant to subsection 24(1) of the *Charter* could constitute an adequate remedy.

The respondent

[22] The respondent continues to maintain that the impugned CDS order poses no threat to judicial independence and does not violate paragraph 11(d) of the *Charter* as it merely clarifies who has the authority to take certain initial procedural steps required to try a military judge before a court martial. The respondent is conscious of the likelihood that a violation will be found, as ruled in *Pett* and subsequent cases. The respondent acknowledges the principle of horizontal *stare decisis* or "judicial comity," summarized in paragraphs 20 and 21 of *R. v. Caicedo*, 2015 CM 4018 to the effect that the military judge presiding this case can depart from previous decisions to avoid perpetuating an error in the interpretation of the law. It is submitted that this principle applies to the challenge of the constitutionality of sections 12, 18 and 20 of the *NDA*, given the reasons provided by my colleague d'Auteuil MJ in *Crépeau* in dismissing the same claim of unconstitutionality because these general provisions are not specifically intended to permit the prosecution of a military judge under the CSD.

[23] Counsel for the respondent focussed his arguments primarily on the exploration of available alternative remedies, short of a stay of proceedings, which in his view are more suitable to address the alleged violation. These include a repeat of the declaration made in *Pett* and, if not sufficient, should not go beyond the remedy of a termination of the proceedings, given that such remedy would allow the prosecution of Captain Iredale to be brought, at least in part, before civilian courts.

Issues

[24] The broad issue is whether there are reasons to depart from the court's conclusion in *Pett*, repeated in *D'Amico* and other decisions since, as it pertains to findings on both the nature of the violation of the right to be tried by an independent and impartial tribunal under paragraph 11(d)

of the *Charter*. Should a violation continue to be found, a second issue will arise as to the appropriate and just remedy under subsection 24(1) of the *Charter*.

Analysis

As it pertains to the violation of the right to a trial before an independent and impartial tribunal, should the law first set in Pett be revisited?

The alleged violation caused by the impugned CDS order

[25] I have been informed at the hearing that the impugned CDS order of 2 October 2019 is still in force, although I have not been informed as to why and for how long this is going to be the case. I have expressed at the hearing my surprise that this order has not yet been rescinded as a simple means to resolve the issue of judicial independence identified by three of the four sitting military judges in a total of six decisions delivered so far in the last eight months. Yet, conscious of the privileged nature of any opinion held by the OJAG and advice which may or may not have been given to the CDS in that regard, as well as the fact that counsel acting for DMP before me may not have received the full and most up-to-date information, I have decided to accept the continued existence of the impugned CDS order as a fact and elected to not inquire further.

[26] Therefore, as it pertains to the analysis of the impact of this order on the rights of an accused at a court martial, there has been no material change in circumstances. Consequently, I see no need to depart from the reasons I rendered in *Pett* which, as it relates to the impugned CDS order, were entirely agreed to and followed by two other colleague military judges. Both parties agree that it would be difficult for me to depart from *Pett* in light of the principle of judicial comity. The prosecution presented submissions to the effect that there is no violation, mainly for sake of conformity to the position it has taken in other cases and wishes to take on appeal. However, the arguments by the prosecution are not new and have been addressed in *Pett* or in other decisions of my colleagues since. In the circumstances, I do not see the need to launch into a piece-by-piece analysis and rebuttal of these submissions.

[27] I must therefore conclude, as done before, that the impugned CDS order of 2 October 2019 expresses the intent of the military hierarchy that military judges be treated as any other officer for the application of the CSD, despite the safeguard built within that *Code* by the Military Judges Inquiry Committee. In doing so, the impugned order generates legitimate concerns of judicial independence and violates the rights of any accused before a court martial under paragraph 11(d) of the *Charter*.

The alleged unconstitutionality of the *NDA* as it pertains to the possibility that military judges be tried as any other officer under the CSD

[28] The applicant's submissions regarding the alleged unconstitutionality of sections of the *NDA* requires a deeper analysis than the issue raised by the impugned CDS order. It attempts to address what was identified in the initial applications in *Pett* and *D'Amico* as the systematic lack of separation between the symbiotic and conflicting roles and status of military judges as both

judges and officers, allegedly compromising the status of military judges as independent judicial officers.

[29] I see the submission of the applicant challenging the constitutionality of sections 12, 18 and 60 of the *NDA* as an attempt to force a complete overhaul of the status of military judges in relation to the executive, as the applicant suggested in *Pett*, but here targeting specific sections of the *NDA*.

[30] This submission requires the same analysis as the one performed in *Pett*, where I assessed that the current legal framework offers sufficient guarantees of judicial independence to allow military judges to be perceived as independent and impartial, in conformity with paragraph 11(d) of the *Charter*. I demonstrated how proper consideration for the judicial complaints mechanism found in the CSD as the primary means to address misconduct by military judges, in combination with recourse to civil courts of criminal jurisdiction as warranted, allows the court martial system to be considered as constitutionally sound, without the need for any broad overhaul. I do not see the need to change my mind. I agree with the respondent's submission and with the findings by d'Auteuil M.J. at paragraphs 79 and 80 in *Crépeau* explaining why sections of general application such as sections 12, 18 and 60 of the *NDA*, impugned by the applicant, are not unconstitutional.

Additional Remarks

[31] That constitutes the findings I am required to make today. I wish, however, to offer a few comments relating to the remarks made in *Pett* as to how the CSD is to operate in relation to military judges.

[32] Indeed, in *Pett* I had to provide sufficient explanations to allow the applicant to understand why his argument pertaining to the systemic lack of adequate separation between the roles of military judges as judicial and executive officers was dismissed. It is in that context that I offered a solution to the concerns of optics raised by an independent judiciary within a military structure. Of course, it is not the only possible solution. For instance, Justice Lesage recommended the creation of a rank of "military judge" to further address perception issues.

[33] The decision in *Pett* has been described by counsel for applicants and other military judges as an exercise in judicial restraint. I have tried not to stray beyond what was required to address the submissions of the applicant. The comments I made on the current framework regarding the discipline of military judges were limited to confirming the existence of the Military Judges Inquiry Committee as the privileged means for the discipline of military judges. My absence of comments on whether this regime is entirely adequate or is in need of improvements should not be interpreted as meaning that I find it to be perfect. I am aware that several justice system actors, including from the judiciary, have observed that the judicial complaints process applicable to other federal judges, on which the *NDA* regime is based, has been in need of reform for some time. If I was to offer a suggestion, it would be to monitor change initiatives in the disciplinary process applicable to all federal judges and consider whether it would be advisable to provide that military judges be subject to the same system.

[34] My reasons in *Pett* have been complemented since by decisions of my colleagues d'Auteuil and Sukstorf JJ.M. For instance, I very much support the statement in paragraph 54 of *Edwards*, to the effect that the perception of conflicting roles and status of military judges as both judicial and executive officers can be deconflicted by viewing appointment to the office of military judge by the Governor in Council as the transfer of a military officer from the executive to the judicial branch of government. That manner of seeing things fits well with the finding in *Pett* to the effect that a military judge cannot be charged as an officer under the CSD while he is in the office of military judge.

[35] Also, it is important to note, as pointed out at paragraph 50 of *Edwards*, that the Military Judges Inquiry Committee process has been placed by Parliament in Part III of the *NDA* – Code of Service Discipline. Therefore, it would be appropriate to state that military judges are liable to be dealt with under the CSD, through the Military Judges Inquiry Committee, even if they cannot be charged with a service offence and dealt as any other officer while in judicial office. In short, they can still be dealt with under the CSD, but in a different manner.

[36] At the hearing, the representative of the DMP brought to my attention what he considers to be differing views of Sukstorf M.J. on the possibility that military judges have to face charges before a court martial even while in office. Indeed, my colleague has decided to share her own observations as to the circumstances which could warrant a military judge to be brought before a court martial and a mechanism by which this could be done. These views are interesting and should be considered in any reform of judicial discipline mechanisms for military judges. That said, I agree with the remarks of my colleague d'Auteuil M.J. at paragraphs 43 and 52 of *Edwards* that the prohibition on pursuing the prosecution of a military judge in office should suffer no exception. In addition to the inherent difficulty in separating the actions of the military judge from those of the officers when these are committed by the same person, as discussed by d'Auteuil M.J., a number of other difficulties present themselves in relation to the suggestion that any decision to bring a military judge before a court martial instead of a civilian court must be justified by military prosecutors. I respectfully believe that such a solution, assuming the current legislative and regulatory framework remains, would risk an improper judicial intrusion in the exercise of prosecutorial discretion. It would give the DMP the power to force a military judge off the bench for considerable periods of time until the matter could be brought before another military judge for evaluation after charges are preferred. Were this to happen, the process would present the same practical difficulties experienced with the *Dutil* matter, with a military judge having to make judicial decisions concerning a colleague. In my respectful view, the mechanism to assess claims of civilian jurisdiction proposed by the CMAC in *R. v. Wehmeier*, 2014 CMAC 5 in relation to a civilian accused who is a stranger to the military judge presiding the trial cannot be transferred to the trial of a colleague military judge.

[37] My position to the effect that a military judge should never be brought before a court martial while in office remains. I am also still of the view that an officer who has relinquished or been stripped of his judicial office by a decision of the Military Judges Inquiry Committee could be subsequently brought before a court martial without concern for judicial independence and impartiality given that he or she is no longer a judge. Of course, it may be difficult to distinguish between the conduct of the officer and the military judge in the circumstances. However, this issue would be best left for the court to determine in the course of a trial.

[38] Despite the best efforts of prosecution counsel to try to highlight differences of views between the military judges who dealt with the issues discussed in the present application, I do not see any disagreement as other than minor and related to peripheral matters. As it pertains to the issue to be decided, all military judges who have dealt with the specific constitutionality issue agree that the current legislative framework does not suffer from a constitutionality failure. That is so even if, in its general operation, the CSD does not expressly preclude military judges from being prosecuted by and through the means applicable to CAF officers who are members of the executive.

Conclusion

[39] There are no reasons to depart from the findings first made in *Pett*. The impugned CDS order of 2 October 2019 generates legitimate concerns of judicial independence and violates the rights of any accused before a court martial under paragraph 11(d) of the *Charter*. Absent this order, the current legal framework, with proper consideration for the judicial complaints mechanism found in the CSD as the primary means to address misconduct by military judges, offers sufficient guarantees of judicial independence to allow military judges to be perceived as independent and impartial, in conformity with paragraph 11(d) of the *Charter*. Sections of general application such as sections 12, 18 and 60 of the *NDA*, impugned by the applicant, are not unconstitutional.

What is the remedy to be applied?

Introduction

[40] The applicant seeks a stay of proceedings as an appropriate and just remedy under section 24(1) of the *Charter*. The Supreme Court of Canada has confirmed in *R v. Babos*, [2014] 1 SCR 309 that a three-pronged test must be applied when an accused seeks a stay of proceedings as a remedy under section 24(1) of the *Charter*:

a. the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;

b. there must be no other remedy capable of redressing the prejudice; and

c. where there is uncertainty after the first two steps, the court must balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

[41] The respondent concedes that when a court has found that the continuation of the trial of an accused before it would violate that accused's right to be tried by an independent and impartial tribunal, the first prong of the test has been met. However, as a stay of proceedings is a remedy of last resort, the respondent submits that other remedies are available and should be imposed, such as:

a. declare the impugned CDS order to be invalid and proceed with the trial, as done in *Pett* and *D'Amico*;

b. adjourn the proceedings until the CMAC has rendered a decision in *Edwards, Crépeau* and *Fontaine*; and

c. terminate the proceedings.

[42] These options will be discussed in turn.

Is the same declaratory remedy imposed in *Pett* and *D'Amico* sufficient?

[43] In *Pett* I found that the declaration of invalidity of the impugned CDS order, combined with the findings included in this decision as it pertains to the limited application of the CSD in its current configuration to military judges, ensures that no reasonable and well-informed observer might form the perception that the military judge presiding that Standing Court Martial was anything less than an independent and impartial tribunal.

[44] The respondent argues that the situation has not changed, in that the CDS order is still valid. Consequently, I am invited to conclude that that the declaratory remedies imposed in *Pett* and *D'Amico* continue to be appropriate as the minimum acceptable intervention given the absence of material change in circumstances.

[45] With respect, this argument ignores the obvious challenge faced in *Pett* where the ultimate decision was made to limit the Court's remedial intervention to declaratory remedies, thereby leaving the applicant-accused without tangible relief despite the violation of his *Charter* rights. The decision not to terminate or stay the proceedings against Master Corporal Pett was a difficult one. At the end I wrote these three paragraphs, quoted by my colleague d'Auteuil M.J. at paragraph 65 of *Edwards*:

> [145] The declaration of invalidity, combined with the findings included in this decision as it pertains to the limited application of the Code of Service Discipline in its current configuration to military judges, ensures that no reasonable and well-informed observer might form the perception that this presiding military judge and this Standing Court Martial is anything less than an independent and impartial tribunal.
>
> [146] This conclusion on the way a reasonable and informed person would view the matter is made with the understanding that military authorities and their legal advisors conduct their affairs with the utmost respect for the rule of law, hence the authority of the courts. Courts have no means to enforce their decisions. The rule of law rests on the acceptance by the executive of judicial decisions and their application, even if or when it does not suit them. Recognizing the right of appeal which could be exercised, it is expected that military authorities will give effect to judicial decisions pertaining to the application of the Code of Service Discipline.
>
> [147] This is not to say that reactions or lack thereof from the military hierarchy in relation to this decision or the issues it raises may not be considered relevant in any subsequent assessment as to whether a reasonable and informed person would view military judges and courts martial as independent tribunals. I am deciding today a novel issue. My decision on the perception of a reasonable and informed observer takes this novelty into consideration and assumes that

> discussions will ensue on measures that need to be implemented in the short, medium and long terms to improve the military justice system. Now is a time where judicious choices need to be made to ensure that this system can continue to function for the benefit of all involved.

[46] I believe anyone who reads this would rightly conclude that the novelty of the issue raised was a key circumstance in the decision to choose which remedy was appropriate and just to address the *Charter* violation found. Similar restraint was exercised by my colleague Sukstorf M.J. at paragraph 80 of *D'Amico*. That novelty is now gone. Eight months have passed since *Pett* was released and the office of the CDS and his legal advisors of the OJAG have not acted on the order which was found to infringe the *Charter* rights of accused persons tried before a court martial. No action was taken to respond to the decision, despite the clear expectation, in the paragraphs quoted above, that something would be done. That is a change in circumstances since *Pett* and *D'Amico*.

[47] As to the importance or materiality of this change in circumstances, I believe the absence of action is significant in the context of the expectations voiced in *Pett*. I do believe that military judges issuing rulings in the course of courts martial proceedings are making law, just as civilian courts of first instance do. I acknowledge that the courts martial in *Pett* and *D'Amico* made no order directed specifically at the CDS, who was not formally a party in those proceedings. However, the CDS is not protected by any privilege which would make his office immune to the authority of the courts. Courts martial, seized with applications from accused persons expressing valid concerns over independence and impartiality, made declarations of invalidity of an order that bears directly on the due exercise of their jurisdiction over accused persons, in accordance with the authority conferred on them by Parliament in section 179 of the *NDA*. They did not stray from their lanes on extraneous matters in an attempt to encroach on the authority of the CDS to manage and control the CAF. I believe a reasonable observer would consider that a statement of law by courts martial on a matter bearing directly on the *Charter* rights of an accused before them, necessary for the continued exercise of their jurisdiction over that accused, constitutes authoritative law. It is so regardless of the exercise of a right to appeal, as recognized at paragraph 56 of *Fontaine*.

[48] That is what I meant by my statement in *Pett* to the effect that "the rule of law rests on the acceptance by the executive of judicial decisions" which finds its philosophical underpinning in this quote from the 8th edition of the seminal work of A.V. Dicey, titled *Introduction to the Study of the Law of the Constitution*, originally published in 1885:

> "[E]very official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." [Dicey, Albert Venn. 1915. *Introduction to the study of the law of the constitution*. London: Macmillan, p. 114]

[49] It seems to me that if the legal justification for an order from the CDS or from any other official is declared to be inaccurate by a competent court, this judicial pronouncement should be given the attention it deserves and lead to corrective action as required, out of respect for the rule of law. The CDS and legal advisors from the OJAG have shown their ability to react swiftly to judicial decisions in the past. On 26 July 2019, the very day the Supreme Court of Canada released its decision in *R. v. Stillman*, 2019 SCC 40, the CDS communicated a message by e-mail to members of the defence community highlighting the critical role that the military justice

system plays in assisting military commanders in maintaining the discipline, efficiency and morale of the CAF. In the conclusion of the same message, still available at the time of writing at https://ml-fd.caf-fac.ca/en/2019/07/32289 one can read as follows:

> "Our military justice system will continue to evolve to serve the interests of Canadians and our armed forces, and I know that all independent actors in the military justice system will continue to perform their duties with the highest degree of professionalism, fairness and respect for the rule of law."

[50] As one of the independent actors in the military justice system, it is very much in that spirit of necessary incremental improvement that I endeavoured to resolve the *Pett* application in the manner I did, illustrated by the paragraphs quoted above. I trusted that respect for the rule of law would in short order generate the necessary implementation of measures to comply with the court's decision, most importantly the cancellation of the impugned CDS order, even pending the outcome of any appeals. As already mentioned, I am surprised that it has not been the case and, reading the more recent reasons of my colleagues Sukstorf and d'Auteuil, I believe they were also surprised at the subsequent inaction. Of course, I know that the person holding the office of the CDS is not him or herself solely making these kind of decisions, nor is he or she drafting messages such as the one published on 26 July 2019. The task of providing legal advice to military authorities on military justice issues rests with officers of the OJAG, to which I was referring at paragraph 146 of *Pett* as they have a fundamental role to play in ensuring respect for the rule of law. The role of legal advisors in that regard was recently recognized, albeit in an entirely different context, by Gleeson J. of the Federal Court, in the recent case of *Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23 (Re)*, 2020 FC 616.

[51] Military authorities and their legal advisors have the capacity to respond rapidly to courts' decisions. Their statement to the effect that they respect the rule of law should not be seen as the only reasons for the expectation of a response to courts martial decisions in *Pett* and *D'Amico*. In my view, the obligation on officers to give lawful commands is a basic principle of military law and military leadership, as exemplified by the fact that the CSD sanctions only disobedience in relation to a lawful command at section 83 of the *NDA*. A decision by a court competent to rule on issues of legality of military orders cries out for action by the authority responsible for that order, even pending resolution of an appeal. Action is even more pressing when the reason for the court's intervention is a recognition that an order violates the *Charter* rights of a subordinate. Indeed, basic leadership principles contained in CAF doctrine recognize the responsibility of leaders to ensure that subordinates are treated fairly and with respect. In my view, this must include respect for the rights recognized in the *Charter*.

[52] For all of these reasons, I find that the change in circumstances which materialized by the failure to act on the court martial decisions in *Pett* and *D'Amico* is material.

[53] Recognizing this, counsel for the respondent argued before me that a strong statement from me as to how independent I feel I am, despite the fact that my words from January 2020 do not appear to have been heard, would be sufficient to convey to reasonable observers that this military judge and this court martial continue to be independent and impartial tribunals. With respect, I disagree.

[54] I believe that a military judge making the same declaration about the impugned CDS order as was made months ago in *Pett* and *D'Amico*, combined with a restatement of her or his belief in his or her own independence would have little weight, in light of the inaction of military authorities in the eight months since *Pett*. In military terms it would indeed be similar to a sentry challenging an intruder once to stop, then challenging the intruder again by saying, "Stop or I will say 'stop' again". Such a repeated declaration would not only be non-credible, it would potentially bring disrepute to the administration of military justice, especially in relation to CAF personnel liable to be tried by court martial under the CSD.

[55] I therefore reject the proposition that declarations such as the ones issued in *Pett* and *D'Amico* would sufficiently remedy the *Charter* violation found in this and recent cases. Such a declaration would not constitute an appropriate and just remedy in the circumstances where no action was taken in the intervening eight months. This finding is not based on a need to send a message or punish military authorities. It recognizes that bringing an accused such as Captain Iredale to this court, whose independence and impartiality has been judicially recognized as lacking in violation of a *Charter* right without taking the steps required to alleviate this violation, makes a declaratory remedy insufficient in relation to the harm done to the accused in this case. As found by d'Auteuil M.J. at paragraph 31 of *Edwards*, the guarantee of judicial independence is for the benefit of the judged, not the judges.

Is an adjournment an appropriate remedy?

[56] In three short paragraphs in its written arguments, the respondent submitted that an adjournment of the proceedings would be a less drastic alternative to a stay of proceedings until the issues raised in this application are resolved by a decision of the CMAC in the appeals in *Edwards*, *Crépeau* and *Fontaine*. After a very short discussion concerning precedents suggested as support for this proposition, counsel for the respondent seemed to agree that the situation today is very different than the situation faced by courts martial immediately following the decision of the CMAC in *R. v. Beaudry*, 2018 CMAC 4, which unexpectedly and suddenly declared paragraph 130(1)(*a*) of the *NDA* to be of no force or effect. The issue debated today was foreseeable and an adjournment would not provide a remedy to the violation alleged. It would simply postpone the determination of the remedy issue for an indeterminate period of time for which the prosecution would have to provide explanation. This is not an acceptable solution.

Should a termination of proceedings be imposed instead of a stay of proceedings?

[57] In a subsidiary argument, the respondent submits the Court should terminate the proceedings instead of ordering a stay to allow the possibility for the accused to be tried in a civilian criminal court for some of the same offences he is facing in this court martial, namely the three charges of sexual assault charged under section 130 of the *NDA*. Citing *R. v. Spriggs*, 2019 CM 4002 as a precedent for this remedy, the respondent submits that the applicant would benefit from a fair and equitable trial before an independent tribunal if, following a termination of these proceedings without adjudication, he is prosecuted in a civilian criminal court.

[58] The difficulty with that argument is that the decision in *Spriggs* accepted as a premise the law set by the CMAC in *Beaudry*, to the effect that Corporal Spriggs, who was initially facing a charge of sexual assault to be tried by General Court Martial, obtained the recognition of a *Charter* right to be tried instead by a judge and jury in a civilian court of criminal jurisdiction. This right was denied to him by virtue of the prosecution withdrawing the very charge which made Corporal Spriggs triable by a civilian court to replace it by a purely military charge of disgraceful conduct, triable only by court martial. Consequently I found that the actions of the prosecution, even if undertaken in good faith without any form of misconduct, constituted an abuse of process as they had the effect of depriving Corporal Spriggs of what was, at that time, a recognized *Charter* right.

[59] The situation of Captain Iredale is exactly the opposite. From the beginning, military investigative authorities decided that the proper forum for the prosecution was a court martial. In order for this to be accomplished, the three offences that would have constituted sexual assault were charged as disgraceful conduct offences contrary to section 93 of the *NDA*. Indeed, sexual assault could not be prosecuted before courts martial at the time the charges were initially laid due to *Beaudry*. When time came to prefer the charges, the Supreme Court of Canada had rendered its decision in *Stillman*, reversing *Beaudry*, once again allowing sexual assault charges to be brought before courts martial. The three charges in question were then preferred as sexual assault charges. Therefore, at two key decision points, both military police charge layers and military prosecutors expressed the view that the proper forum for hearing the charges was a court martial.

[60] In addition, the conduct of the defence provided another opportunity for the prosecution to evaluate the issue of whether this case belonged before a court martial. Indeed, Captain Iredale filed an application for a plea in bar in this case on 22 January 2020, amended on 12 May 2020, alleging the lack of military jurisdiction on him. The prosecution opposed the plea in bar by submitting justifications and explanation in support of its claim for military jurisdiction. The plea was summarily dismissed on 23 June 2020 with reasons provided in writing on 15 July 2020 at *R. v. Iredale*, 2020 CM 4008. I found that the applicant had not met his burden to point to evidence or provide sufficiently precise detail of the nature of the plea in bar to properly raise the issue of jurisdiction over the accused. At the same time, I held that that the prosecution was on notice that jurisdiction was a live issue at trial and would therefore be allowed to introduce evidence going to military jurisdiction as part of its case. No decision was made to withdraw the sexual assault charges and proceed to civilian court following that decision. The trial is scheduled to commence before the panel on 28 September 2020.

[61] It would appear then that on four occasions the prosecution made a choice to the effect that this trial should proceed before a court martial, a decision it maintained despite a challenge to jurisdiction initiated after *Pett* was released and published. This means that the prosecution, informed that its choice of forum suffered from a significant deficiency as it pertains to the right of accused to be tried by an independent and impartial tribunal under paragraph 11(d) of the *Charter*, nevertheless persisted in bringing Captain Iredale before a court martial. In doing so, the prosecution made its bed: the court martial is where the trial should be held in the public interest. I am therefore finding it hard to accept that after a *Charter* violation has been confirmed, at the stage of determining an appropriate remedy, the prosecution suddenly finds the perspective

of a trial by a civilian court attractive. This is a situation similar to what was described at paragraph 60 of *Fontaine*: there too the prosecution tried its luck in bringing an accused before a court martial and, when faced at the eleventh hour with the foreseeable outcome of a court martial which cannot go ahead, tried to obtain a termination instead of a complete stay of proceedings, allegedly to allow a trial to proceed before a civilian court.

[62] The Supreme Court of Canada has stated at paragraph 55 of *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 that "[a] meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied." Given the circumstances I have just described and in consideration of the experience of Captain Iredale, who was brought as an accused before a court which was known to suffer from a significant deficiency as it pertains to his right to be tried by an independent and impartial tribunal, I have concluded that the *Charter* violation that he suffered should be remedied by a stay of proceedings. A termination of proceedings, which would allow the prosecution of Captain Iredale in a civilian court for three of the offences he is facing, would bear no connection to his experience or the circumstances in which his right was infringed.

[63] The prosecution's ship has sailed. The prosecution will either go down with it or will be able to get back to port following a successful appeal. Indeed, the distinction between the remedies of stay and termination of proceedings makes no difference on appeal as they are both covered under the same ground at section 230.1(d) of the *NDA* and may benefit from the same order for a new trial if the appeal is successful as per section 239.2 of the *NDA*. Therefore, should the CMAC or the Supreme Court of Canada find that I erred in this decision, Captain Iredale will most likely face a new trial by court martial. If this decision and those of my colleagues in *Edwards*, *Crépeau*, *Fontaine* and who knows how many more cases be upheld, Captain Iredale should benefit from the same remedy that other accused persons in his situation have obtained thus far. Considering imperatives of fairness and equality of treatment, this is in my view the only appropriate and just solution in the circumstances.

[64] I am arriving at this solution also in consideration of principles of judicial comity as my colleague d'Auteuil M.J. arrived at the same conclusion in *Fontaine*, a case which, just as this one, dealt with charges under section 130 of the *NDA*. I have considered the interest of society in seeing that officers of the CAF be brought to answer for their actions before courts martial when they are alleged to have committed sexual assault and engaged in conduct of a sexual nature to the prejudice of good order and discipline. I am also mindful of the fact that a stay of proceedings would prevent a complainant from having her claims of wrongdoing heard. I have also considered the severity of the interference with judicial independence highlighted in the circumstances of this case. I have concluded, as my colleague did, that the interest in preserving judicial independence trumps any interest in continuing the proceedings.

Conclusion

[65] I find that the appropriate and just remedy considering what the accused has experienced in this case as well as the disposition in other cases cannot be anything less than a stay of the proceedings of this General Court Martial.

FOR THESE REASONS, THE COURT:

[66] **GRANTS** in part the application of Captain Iredale.

[67] **DECLARES** that the right of Captain Iredale under paragraph 11(d) of the *Charter* to a hearing by an independent and impartial tribunal has been infringed.

[68] **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.

[69] **DIRECTS,** pursuant to section 24(1) of the *Charter*, that the proceedings of this General Court Martial in respect of Captain Iredale be stayed.

Dated this 17th day of September 2020, at the Asticou Centre, Gatineau, Quebec

"J.B.M. Pelletier, Commander"
Presiding Military Judge

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Colonel D. Martin, Major C. Walsh and Major M.-A. Ferron, Prosecutors and Counsel for the Respondent

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Captain M.J. Iredale, the Accused and Applicant