HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012

Date: 20201014
Docket: 201972

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Master Warrant Officer J. MacPherson,

Applicant

- and -

Her Majesty the Queen,

Respondent

Date: 20201014
Docket: 202003
202004

Preliminary Proceedings

Asticou Courtroom
Gatineau, Quebec, Canada

And Between:

Warrant Officer S. Chauhan,
Private J.L.

Applicants

- and -

Her Majesty the Queen,

Respondent

Application heard in Gatineau, Quebec on 7 and 8 October 2020.
Decision rendered orally in Gatineau, Quebec on 14 October 2020.
Written reasons delivered in Gatineau, Quebec on 23 October 2020.

Before: Commander S.M. Sukstorf, 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information obtained in relation to these proceedings that could identify anyone described as the complainant, shall not be published in any document or broadcast or transmitted in any way.

Restriction on publication: Pursuant to section 179 of the *National Defence Act*, and section 486.4 of the *Criminal Code of Canada*, the Court further directs that any information that could disclose identity of the person described during these proceedings as the complainant or as the accused Private J.L. shall not be published in any document or broadcast or transmitted in any way.

DECISION ON A DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS

Introduction

[1] The three applicants before the Court challenge whether a military judge presiding a court martial is an independent and impartial tribunal within paragraph 11*(d)* of the *Canadian Charter of Rights and Freedoms, Constitution Act*, 1982. Their challenge is based on two arguments. The first argument alleges a lack of administrative independence asserting that the Office of the Chief Military Judge (OCMJ) to which military judges belong is not sufficiently independent from the executive. The second argument alleges that military judges lack the required institutional independence from the executive in order to protect the accuseds' rights under paragraph 11(*d*) of the *Charter*. Paragraph 11*(d)* of the *Charter* reads as follows:

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

[2] This decision is delivered in response to a joint hearing held on 7 and 8 October 2020 for the three applications. Each case has been convened separately and consequently, each accused is represented by different defence counsel and the prosecutor is also different for each accused.

Background

[3] Courts martial are not new to constitutional challenges, having faced challenges to their judicial independence in the past[1]. The most recent challenge to judicial independence arose in the fall of 2019 after defence counsel became aware of a Chief of the Defence Staff (CDS) Order 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, DATED 2 OCTOBER 2019" (CDS Order). The CDS Order provided for a commanding officer to exercise powers and jurisdiction over military judges. The controversial paragraphs of the CDS Order[2] read as follows:

> "1. I, J. H. Vance, Chief of the Defence Staff, pursuant to subsection 18(1) of the *National Defence Act* and for the purposes of the definition of "commanding officer" contained in article 1.02 of the *Queen's Regulations and Orders for the Canadian Forces*, hereby:
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> a. revoke the previous designation order of 19 January 2018 with respect to this unit;
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> b. designate the officer who is, from time to time, appointed to the position of Deputy Vice Chief of Defence Staff (DVCDS) and who holds a rank not below Major-General/Rear-Admiral, to exercise the powers and jurisdiction of a commanding officer with respect to <u>any disciplinary matter</u> involving a military judge on the strength of the Office of the Chief Military Judge;
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> . . .
>
> 2. The next superior officer in matters of discipline to whom the DVCDS is responsible, when acting as a commanding officer referred to in paragraph (b) shall be the Vice Chief of the Defence Staff (VCDS)"[3]
> [Emphasis added]

[4] Put simply, the CDS Order delegated power to the Deputy Vice Chief of the Defence Staff (DVCDS) to lay charges against a military judge if he or she is alleged to have committed a service offence. The fact that military judges might be subject to the Code of Service Discipline[4] (CSD) in their role as serving officers in the Canadian Armed Forces (CAF) is not in and of itself contentious, given their dual role. In fact, by virtue of their ranks, they are automatically captured in general orders. However, the

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[1] *MacKay v. The Queen*, [1980] 2 S.C.R. 370 and *R. v. Généreux*, [1992] 1 S.C.R. 259.
[2] DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763, dated 2 October 2019, (hereinafter CDS Order) (ANNEX A).
[3] The impugned CDS Order 2019, replaced an earlier CDS Order (CDS Order 2018) which was issued on 19 January 2018 with similar wording. The 2018 CDS Order was the first such Order ever issued that specifically focussed on military judges as a group. It was issued immediately preceding the laying of charges against the former Chief Military Judge, Colonel Mario Dutil.
[4] The *Code of Service Discipline* (CSD) is contained in Part III of the *National Defence Act*, R.S.C., 1985, c. N-5, (hereinafter *NDA*). The CSD is "an essential ingredient of service life" (see *MacKay* at page 398).

CDS Order focussed specifically on military judges as a group. The CDS Order provides a member of the executive with the power and jurisdiction to charge military judges with respect to "any disciplinary matter". To put it plainly, this overbreadth is akin to providing local prosecutors in civilian courts with the ability to charge local judges for alleged judicial misconduct that occurs inside the courtroom.

[5] As evidenced by rules applicable to all federally appointed judges published by the Canadian Judicial Council, *Ethical Principles for Judges*[5], once appointed, all judges are accountable to judicial discipline committees and liable for their conduct both in and out of the courtroom. Military judges are no different. The *NDA* established a Military Judges Inquiry Committee (MJIC)[6] empowered to conduct inquiries with respect to complaints regarding military judges. The amount of power provided to the MJIC is significant and notably broader than that of civilian judicial disciplinary committees[7]. In fact, in substance, the power provided to the MJIC replaces powers that would customarily fall within the responsibility of the chain of command concerning major decisions in a subordinate's career. The MJIC itself has the power to decide if a military judge has the capacity or ability to remain in their role, with respect to infirmity, misconduct, performance in the execution of their judicial duties as well as whether they satisfy the physical and medical fitness standards applicable to officers.

[6] In order to fully appreciate the context of the current applications, a summary of recent courts martial findings on the issue of judicial independence unfolding over the last year alone is particularly instructive.

[7] In late fall of 2019, upon learning of the CDS Order, several accused submitted applications contending that the CDS Order which purported to subject military judges to the disciplinary powers of the DVCDS was a violation of their paragraph 11(*d*) *Charter* rights. In the cases of *Pett* and *D'Amico*,[8] both military judges declared the CDS Order to be of no force or effect as it pertained to the above paragraphs.[9] In *D'Amico*, as the sitting trial judge, I agreed with Pelletier M.J.'s earlier decision in the case of *Pett* that the CDS Order 2019 was overbroad as it encroached on the jurisdiction of the MJIC:

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

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[5] Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998)
[6] Section 165.31 of the *NDA*.
[7] *R. v. Pett*, 2020 CM 4002 paragraphs 93-94.
[8] *R. v. D'Amico*, 2020 CM 2002.
[9] On 10 January 2020, the *Pett* decision was rendered and was followed up by the *D'Amico* decision on 21 February, 2020. Both decisions responded to the exact same application.

[8] Recognizing the nature of military culture, as the presiding military judge in *D'Amico*, I emphasized the importance of judicial independence:

> [46] It is important to keep in mind that this application is about the rights of the accused and not about military judges or their particular status under the CSD. However, in light of the fact that an accused person's defence in law might rely upon assertions that the chain of command may not have acted appropriately or may have otherwise breached the accused's rights in some capacity, it is imperative to demonstrate to all serving CAF members that military judges can and do decide their cases independently from the prosecution and the chain of command.
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> [47] There are times when military judges must render decisions where they have no choice other than to be critical of the actions or conduct of the chain of command. An accused person needs to know that the military judge hearing his or her case is truly independent and not under any undue influence by the chain of command in any way. This level of independence requires military judges to avoid relationships with those in the chain of command as a means of promoting impartiality and to ensure that a judge's judicial independence is not compromised.
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> [48] Recognizing that courts martial and military judges are part of the CAF, in order to protect the rights of an accused person, it is imperative that military judges are placed in the most advantageous position to be impartial and independent.

[9] Although the judges in both the *Pett* and *D'Amico* cases exercised significant restraint, they were both unequivocal in denouncing the unacceptable overbreadth of the CDS Order and called upon the executive to correct it and examine the issues further. The two decisions were in complete agreement on the substantive issue related to infringement arising from the overbreadth of the CDS Order; however, as the presiding military judge in *D'Amico*, I recognized that in exceptional circumstances, such as offences that occur outside Canada, the application of the CSD may be required to fill a necessary jurisdictional void in criminal law.[10]

[10] However, in July 2020, over six months after the first declaration was made in *Pett*, the CDS Order still had not been rescinded. Just prior to the start of the court martial in *R. v. Bourque*, 2020 CM 2008[11], defence counsel raised the same application challenging the independence of the military judiciary. In response to the prosecution's motion to quash the last-minute application, counsel for Major Bourque argued that he expected that after the court martial decisions in *Pett* and *D'Amico*, the CDS order would have been rescinded and that he had just learned of its continued existence.

[11] At the time of the *Bourque* trial, courts martial operations had just resumed after being temporarily suspended due to the COVID-19 pandemic. Faced with a busy court calendar, I expressed frustration with the demands being placed on the court martial system from the continued existence of the CDS Order.

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[10] *D'Amico*, *supra* note 8 at paragraphs 57 to 64.
[11] Decision delivered on 10 July 2020.

> [37] Allowing this status quo to continue with the continual churn of applications does nothing more than degrade and erode confidence in the entire military justice system. Further, it continues to monopolize significant judicial resources, not to mention the resources of the DMP and Director of Defence Counsel Services (DDCS) thereby impairing the timely administration of military justice. As the court in *Kazman* concluded, a trial judge must also consider how the decision in the case before them affects the entire court calendar in other ways. In fact, this Court must weigh not just how the interests of justice lie in this specific case, but it must also assess whether the impact of a slight delay in this case will help or hinder the overall Court calendar. If this issue is resolved at the earliest opportunity, then it is expected that the recurrence of the same litigious issue will end and both the judiciary and counsel can focus on the priority of the cases before them. There is clearly no utility to permitting the status quo to continue.

[12] Given the absence of evidence that the executive was aware of the rulings in *Pett* and *D'Amico* and recognizing that the CDS had been seized with a number of critical operational issues,[12] I adjourned the hearing to permit the matter to be brought to his attention and provide him the opportunity to rescind the impugned CDS Order.

> [35] As I explained to counsel during the proceedings, there is no evidence before the court to suggest that the CDS or his office have refused to recognize the courts' Orders. Further, there is no evidence that they are even aware of the decisions rendered in *Pett* and *D'Amico*. As a result, I feel compelled to extend to the Executive the same accommodation that I am affording to defence counsel in assessing his late submission of notice.

[13] In *Bourque*, I also reminded counsel of their responsibilities to give effect to the court's direction:

> [40] … As officers of the court, and part of both DDCS and DMP who are nestled within the Office of the Judge Advocate General (OJAG), the legal adviser to the Executive, I expect counsel to pass this decision along and seek the appropriate assistance to give effect to this direction.
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> [41] The decisions in *Pett* and *D'Amico* have confirmed that the CDS Order as currently written infringes the rights of an accused to be tried by an independent tribunal and it is of no force and effect. In rendering legal advice to the Executive, I have full confidence that the legal advisers in the OJAG will fulfil their professional responsibility in rendering legal advice consistent with the current law.

[14] Before the court could hear the application in the *Bourque* case, the accused subsequently agreed to a plea bargain. Given that the paragraph 11(*d*) *Charter* right belongs to the accused and is for his benefit, his application was subsequently abandoned.

[15] Unfortunately, despite the strong pronouncement issued in the *Bourque* case intended to ensure the executive had been duly informed, there were yet four more decisions delivered on applications on the same indistinguishable issue. One month

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[12] Military pandemic response: (https://www.cbc.ca/news/politics/covid19-military-seniors-1.5559558); April 29, 2020, Helicopter accident on HMCS Fredericton (https://www.cbc.ca/news/canada/nova-scotia/helicopter-crash-canadian-forces-military-ceremony-1.5554293); May 17, 2020, Snowbird crash (https://www.cbc.ca/news/canada/british-columbia/plane-crash-kamloops-1.5573930).

after the *Bourque* decision, on 14 August 2020, in the cases of *R. v. Edwards*, 2020 CM 3006 and *R. c. Crépeau*, 2020 CM 3007, d'Auteuil A/C.M.J. issued stays of proceedings. One month after that, two more stays of proceedings were ordered in the case of *R. c. Fontaine*, 2020 CM 3008 on 10 September 2020 and, finally, on 11 September 2020 in the case of *R. v. Iredale*, 2020 CM 4011[13].

[16] Military judges are entrusted with important decision-making powers and are accountable to maintain the public's confidence in the military justice system. All members of the CAF must have confidence appearing before courts martial knowing that their cases will be decided without improper influence. Consequently, military judges have a responsibility to protect their independence and impartiality. This is not out of self-interest, but it is an obligation owed to all the members of the CAF. The protection of judicial independence extends beyond one particular court martial. It is a public trust. Given the absence of any reaction, military judges hearing the last four cases felt they had no other recourse but to stay the proceedings. In the most recent case of *Iredale*, Pelletier M.J. expressed the following:

> [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.
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> [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.

[17] The CDS Order was eventually suspended on 15 September 2020[14] just prior to the commencement of the 16 September 2020 scheduled hearings into the applications of Master Warrant Officer MacPherson and Private J.L. On 16 September 2020, the Court was provided with a copy of the CDS Suspension Order and defence counsel requested a short adjournment to consider its impact. After some consideration, defence

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[13] On 11 September 2020, Pelletier, MJ delivered an oral decision, followed up by his written reasons released on 17 September 2020.

[14] CDS Order DATED 15 September 2020: SUSPENSION OF THE ORDER DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763 DATED 2 OCTOBER 2019. (hereinafter the CDS Suspension Order), (ANNEX B)

counsel advised the Court that the applicants intended to revise their application and resubmit it and had agreed with Director of Military Prosecutions (DMP), the respondent, to a postponement of the hearing to permit the filing of new submissions on the matter. The matter was subsequently set down for the 7 and 8 of October 2020. Separately, Warrant Officer Chauhan also submitted the identical application and the Court requested that all three applications be heard together.

Positions of the parties

Applicants

[18] The applicants argued that the issue before this Court is different from the issue raised in *Pett* and *D'Amico* where the courts focused only on the effect of the CDS Order. The collective arguments of the three accused are summarized as follows:

(a) The OCMJ, to which military judges belong, lacks administrative independence from the CAF. In consideration of this argument, the applicants submitted the following facts:

(i) the OCMJ does not have a financial agreement or Memorandum of Understanding (MOU) with the Minister of National Defence (MND), Minister of Finance or the CDS;

(ii) the OCMJ budget is not set out by Parliament in the *Appropriation Acts*[15] and the OCMJ is therefore completely dependent on the Executive for the receipt of its funding;

(iii) as a Level 1(L1) unit, the OCMJ is required to submit a business plan annually to the Chief of Program (CPROG), which is administered by Director Budget (DB), who is a member of the executive and currently holds the rank of Captain(N);

(iv) the OCMJ is not a permanent court and established pursuant to Ministerial Organization Order (MOO)[16] 2000007[17]; and

(v) the government, represented by the MND and DMP are routine litigants before the courts they are funding.

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[15] The *Appropriation Acts* is the vehicle through which expenditures from the Consolidated Revenue Fund are authorized in order to pay for government programs and services.

[16] A MOO is issued by the MND pursuant to section 17 of the *NDA*. It is a unit's, formation's, etc. legal authorization to exist and carry out its function. It is used by the MND to organize elements of the CAF. It establishes four characteristics of the element: Name, Type (element, unit, formation, command), Embodiment (Regular Force, Reserve Force, Special Force) and Chain of Command through allocation. See (http://intranet.mil.ca/en/deptl-mgmt/org-moos.page)

[17] Ministerial Organization Order (MOO) 2000007 signed by then Minister of National Defence Arthur Eggleton on 07 February 2000 (ANNEX C).

(b) The OCMJ, the unit to which military judges belong, lacks institutional independence. To support their submissions, the applicants rely upon the following:

(i) The CDS specifically chose to suspend the CDS Order dated 2 October 2019 rather than rescind or revoke it as directed by the military judiciary in order to send a message to the military judiciary. As evidence, they argue that the order was specifically crafted to send the following message:

a. the Executive is aware of the military judicial decisions, but advises that they have been appealed. The applicants suggest that by only suspending the CDS Order, rather than rescinding or revoking the order, the CDS is communicating that he expects a favourable appeal;

b. the suspension order makes it clear it was only ordered to avoid further stays of proceedings by the military judges;

c. the reference to the continuing effect of the Canadian Forces Organization Order[18] (CFOO) 3763[19] is intended to remind military judges that they remain subject to the CSD by virtue of their role as officers;

(ii) Through the operation of CFOO 3763 and the fact that military judges are captured in CDS Order dated 14 June 2019[20] it is clearly the intention of the Executive to subject military judges to the full application of the CSD;

[19] In terms of relief, the applicants seek the following:

(a) a declaration pursuant to subsection 52(1) of the *Constitution Act, 1982* that sections 12, 17, 18 and 60 of the *National Defence Act* (*NDA*)[21] violate the constitutional principles of judicial independence protected by paragraph 11(*d*) of the *Charter* and are thus of no force or effect and to provide the executive six months to correct the breach;

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[18] CFOOs are Orders issued by the CDS, pursuant to section 18 of the *NDA.* They are subordinate and organizational documents to the MOO and and not intended for use as an authority for other than organizational purposes. They normally describe a unit or other element's role, command and control relationships, language designation, support services relationships, and channels of communication. (See http://intranet.mil.ca/en/deptl-mgmt/org-cfoos.page)

[19] Canadian Forces Organization Order (CFOO) 3763 establishes the OCMJ and was issued on 27 February 2008. (ANNEX D) It superseded an earlier version of CFOO 3763 dated 20 February 2002.

[20] CDS ORDER – DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO CERTAIN OFFICERS AND OTHER RANKS ON THE STRENGTH OF THE NATIONAL DEFENCE HEADQUARTERS, DATED 14 JUNE 2019 (Hereinafter CDS Order June 2019) (ANNEX E)

[21] Sections 12, 17, 18 and 60 of the NDA are set out at (ANNEX F)

(b) a declaration that MOO 2000007, CFOO 3763, the CDS Order dated 14 June 2019 and the CDS Suspension Order dated 15 September 2020 violate the applicants' right to be tried by an independent and impartial tribunal protected by paragraph 11(*d*) of the *Charter*;

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

(d) a combination of a declaration and a stay of proceedings;

(e) the termination of proceedings that will inform Parliament and the executive of the current problem before the court where in the Court's reasons may be found recommendations and solutions on how to solve these issues. They suggest it also opens up the possibility for the prosecution to transfer the cases to the civilian criminal justice system permitting the CAF time to adequately address the problems; and

(f) any such other relief as this Honourable Court deems just.

Respondents

[20] In response to the three applications, the prosecution argued as follows:

(a) The fact that the CDS Order has been suspended remediates the violation to paragraph 11(*d*) of the *Charter* that was previously identified in the cases of *Pett*, *D'Amico*, *Crépeau*, *Fontaine*, *Edwards* and *Iredale*. He argued that three military judges made specific pronouncements that, absent the CDS Order, there were no apparent concerns with the lack of independence and impartiality of the military judiciary;

(b) In courts martial decisions in *Crépeau* and *Iredale*, sections 12, 18, and 60 of the *NDA* have already been found to comply with paragraph 11(*d*) of the *Charter*. The respondent further submitted that section 17 of the *NDA* is also compliant with paragraph 11(*d*) for the same reasons provided. The respondent further submitted that the legislative provisions challenged by the applicant are foundational sections of the *NDA* that provide general authority in relation to the governance of the CAF and the scope of jurisdiction of the CSD. He argued that they do not specifically target military judges nor do they authorize anyone to take any action that is unlawful. He argued that based on the judicial reasons provided in *Crépeau* and *Iredale*, judicial comity should bring this Court to the same conclusion;

(c) The administrative and budgetary framework applicable to the OCMJ meets the requirements of paragraph 11(*d*) of the *Charter*. Under the current structure, the OCMJ enjoys a sufficient degree of administrative independence; and

(d) Finally, he argued that if the Court finds any residual violation of paragraph 11(*d*), this Court may cure it by a simple declaration. The respondent further asserts that the remedy sought by the applicant being a stay of proceedings is not warranted. He recommended that pronouncements may be sufficient to engage the executive in making the necessary adjustments.

[21] The facts related to the respective accused are briefly summarized as follows:

(a) On 10 December 2019, two charges were preferred by the Regional Military Prosecutor Central (RMP(C)) against Master Warrant Officer J. MacPherson for two counts of sexual assault contrary to section 271 of the *Criminal Code* for alleged incidents that occurred late summer and fall of 1998 at or near Gagetown, New Brunswick;

(b) On 22 January 2020, two charges were preferred by the RMP(C) against Warrant Officer Chauhan for one count contrary to section 271 of the *Criminal Code* for sexual assault and another count contrary to section 93 of the *NDA* for disgraceful conduct regarding alleged incidents that occurred on or about 25 June 2019 at or near Petawawa, Ontario ; and

(c) On 31 January 2020, two charges were preferred by RMP Atlantic against Private J.L. One count related to an allegation contrary to section 271 of the *Criminal Code*, for sexual assault and a second count for an allegation contrary to section 93 of the *NDA* for disgraceful conduct for alleged incidents that occurred on 9 May 2019 at or near Aldershot, Nova Scotia.

Issues

[22] The issues for this Court to decide are narrowed down as follows:

(a) Does the OCMJ, to which military judges belong, lack administrative independence from the CAF infringing an accused's right to an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*?

(b) Do military judges, who belong to the OCMJ, a unit of the CAF, lack institutional independence thereby infringing an accused's right to an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*?

(c) Do sections 12, 17, 18 and 60 of the *NDA* violate paragraph 11(*d*) of the *Charter?* and

(d) If the answer is yes to either (a) (b) or (c), what is the appropriate remedy?

Law on judicial independence

[23] Although the Supreme Court of Canada (SCC) guidance on judicial independence has evolved through the years, and will continue to evolve, in order to understand its applicability to military courts martial, it is imperative to canvas all the relevant SCC decisions on the subject as well as the statutory framework in place within the *NDA*.

[24] The SCC addressed judicial independence in courts martial as early as 1980 in pre-*Charter* jurisprudence. In *MacKay,* the SCC was similarly asked whether a military tribunal closely associated with the executive met the requirements of judicial independence pursuant to paragraph 2(*f*) of the *Canadian Bill of Rights*, a paragraph corresponding to paragraph 11(*d*) of the *Charter*.

[25] In *MacKay*, the accused argued he was deprived of a hearing by an independent and impartial tribunal because the president of the standing court martial was a member of the executive, albeit a lawyer and part of the OJAG. Although the SCC case law on paragraph 11(*d*) of the *Charter* has significantly evolved, the SCC comments in *MacKay* continue to provide essential guidance being relied upon as recently as the SCC decision delivered in 2019 in *R. v. Stillman*, 2019 SCC 40. Justice Ritchie writing for the majority in *MacKay* made some important statements that debunked the assertion that the president at that time was unsuitable to preside over a court martial simply because he was a member of the Armed Forces. At page 395, he wrote:

> The complaint in this regard centred on the submission that the appellant was deprived of a hearing by an independent and impartial tribunal because the president of the standing court martial was unsuitable for that task as he was a member of the Armed Forces albeit of the Judge Advocate General's Branch.
>
> It should I think be observed that the Court which tried the appellant was established by the Governor in Council (s. 154(1)) and the president, who was appointed by the Minister of National Defence, was an officer whose rank indicates that he had had some years of military service and whose position with the branch of the Judge Advocate General bespeaks familiarity with military law. An officer such as this whose occupation is closely associated with the administration of the law under the *National Defence Act* and whose career in the army must have made him familiar with what service life entails would, with all respect to those who hold a different view, appear to me to be a more suitable candidate for president of a court martial than a barrister or a judge who has spent his working life in the practice of non-military law.

[26] Further, at pages 399-400, Ritchie J. referred to the judgment delivered by Cattanach J.[22] where he emphasizes the history and importance of having a separate military justice system. It serves as an important reminder that due to the role and function of an armed force, a code of service discipline is critical:

> Military law and its administration in armed forces has subsisted since time immemorial and it has subsisted in Canada since the first Canadian military force was organized one year after Confederation. However it is a fundamental constitutional principle that a soldier does not, by virtue of joining the armed forces and the consequent military character he assumes, escape the jurisdiction of the civil courts of this country. Accordingly the ordinary law that applies to all citizens also applies to members of the armed forces but by joining the armed forces those members subject themselves to additional legal liabilities, disabilities and rights, that is to say to Canadian military law.
>
> Without a code of service discipline the armed forces could not discharge the function for which they were created.

The same learned judge later made the following comment:

> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

[27] In assessing the context of military tribunals and the role of military officers as judges, the comments of McIntyre J. at pages 403-404, in concurring reasons in *MacKay* remain relevant today. He recognized the particular need for special knowledge and experience in the role as a judge and rejected arguments that military judges cannot also be serving officers.

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the

[22] As Cattanach J. recognized in *MacKay v. Rippon*, [1978] 1 F.C. 233 (T.D.).

> exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline—which includes the welfare of their men—are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.
>
> Furthermore, the problems and the needs of the armed services, being in many respects special to the military, may well from time to time require the special knowledge possessed by officers of experience who, in this respect, may be better suited for the exercise of judicial duty in military courts than their civilian counterparts. It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions. It must also be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal processes. The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service and I find no offence to the *Canadian Bill of Rights* in this respect. I would add that there now exists a Court Martial Appeal Court, a professional Court of Appeal with a general appellate jurisdiction over the courts martial. This is, in my view, a significant safeguard and its creation is a realistic and practical step toward the provision of that protection which is required in the circumstances.
> [Emphasis added]

[28] In *MacKay*, the court rejected the argument that the court martial format that existed in 1980 deprived a service member of his right to a fair hearing by an independent and impartial tribunal as set out in paragraph 2(*f*) of the *Canadian Bill of Rights*. However, since the inception of the *Charter*, the SCC has amplified its guidance and insight into the guarantees of independence sufficient for judges to qualify as independent tribunals pursuant to paragraph 11(*d*) of the *Charter*, transforming the applicable test for judicial independence from a subjective to an objective one.

[29] In its first post-*Charter* stance on the issue, in the case of *Valente*[23] the court significantly amplified its earlier guidance. Although *Valente* does not relate to military justice, it is the seminal case. Writing for a unanimous SCC, Le Dain J. defined the content of the right of paragraph 11(*d*) of the *Charter* by drawing a firm line distinguishing between the concepts of independence and impartiality. Justice Le Dain explained that "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case."[24] Whereas, he described

[23] *Valente v. The Queen*, [1985] 2 S.C.R. 673
[24] *Ibid* at 685.

independence, as a reference to the "status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees".[25]

[30] In *Valente*, Le Dain J. confirmed three "essential conditions" "at the heart" of protecting judicial independence.[26] They are security of tenure, financial security and the institutional independence of judicial tribunals regarding matters directly affecting adjudication. The pivotal guidance is summarized as follows:

(a) Security of tenure. This requires judicial appointments to be "secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."[27] In order for such security to be achieved, judges may be "removable only for cause" as recommended by an independent review process which affords judges a fair hearing[28]. Further, Le Dain J. specifically found that statutory guarantees of security of tenure pass the "reasonable person test" and although constitutional guarantees were desirable they were not essential;[29]

(b) Financial security. This requires that the right to a salary and, where appropriate, to a pension, must be established by law.[30] Further, the use of power by purse strings such as the pay of a judge or budget who decide against government are unacceptable; and

(c) Institutional independence. With respect to matters directly affecting adjudication, Le Dain J. stated only a narrow array of administrative functions could be captured by this: "assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions."[31]

[31] In summary, the three essential conditions must be analysed by applying a "reasonable person" test. Security of tenure requires legislated safeguards; financial security may be fulfilled less formally provided that the right to salary is clearly established in law and there is no threat that salaries can be manipulated based upon the nature of the judicial decisions rendered. Finally, institutional independence extends only to administrative matters necessary in adjudication. In the applications before the Court, aside with a periphery argument that affects security of tenure, the arguments are primarily based on the third element under institutional independence which they argued from both an administrative and institutional level.

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[25] *Ibid* Introduction.
[26] *Ibid* at 694.
[27] *Ibid* at 698.
[28] *Ibid* at 698.
[29] *Ibid* at 702.
[30] *Ibid* at 704.
[31] *Ibid* at 709.

[32] Less than a year after *Valente*, the SCC rendered its decision in *The Queen v. Beauregard,* [1986] 2 S.C.R. 56 where it fine-tuned its earlier direction. In short, Dickson C.J. focussed on the purpose of judicial independence recognizing that for the purpose to be fulfilled, the judiciary must be "completely separate in authority and function from all other participants in the justice system."[32] [Emphasis in original.]

[33] A few years after *Beauregard*, in its decision in *MacKeigan v. Hickman,* [1989] 2 S.C.R. 796, the SCC clarified that it was unrealistic to demand the complete separation of the judiciary from other branches of government and McLachlin J. wrote at page 827:

> It is important to note that what is proposed in *Beauregard v. Canada* is not the absolute separation of the judiciary, in the sense of total absence of relations from the other branches of government, but separation of its authority and function. It is impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government. Statutes govern the appointment and retirement of judges; laws dictate the terms upon which they sit and are remunerated. Parliament retains the power to impeach federally-appointed judges for cause, and enactments such as the *Supreme Court Act*, R.S.C. 1970, c. S-19, stipulate on such matters as the number of judges required for a quorum. It is inevitable and necessary that relations of this sort exist between the judicial and legislative branches of government. The critical requirement for the maintenance of judicial independence is that the relations between the judiciary and other branches of government not impinge on the essential "authority and function", to borrow Dickson C.J.'s term, of the court. What is required, as I read *Beauregard v. Canada*, is avoidance of incidents and relationships which could affect the independence of the judiciary in relation to the two critical judicial functions -- judicial impartiality in adjudication and the judiciary's role as arbiter and protector of the Constitution.
> [Emphasis in original]

[34] In summary, although by necessity there must be some institutional relations between the military judges and the chain of command, such relations must not interfere with the military judge's liberty to adjudicate the matters before him or her.

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

[36] A year later, in *R. v. Généreux*, [1992] 1 S.C.R. 259, the SCC had the occasion to examine judicial independence in courts martial. Not only did the SCC accept the dual role of military judges as officers of the CAF, it recognized that some degree of connectivity between the chain of command and the decision-makers was impossible to avoid. More simply, it confirmed the fact that military judges who are also serving officers in the CAF is not sufficient by itself to constitute a violation of paragraph 11(*d*) of the *Charter.* The headnote to *Généreux*, summarizing part of the position of the majority, *per* Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci JJ, is informative:

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[32] *Beauregard* at paragraph 30.

> A parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, is not, by its very nature, inconsistent with s. 11(*d*).The existence of such a system, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by compelling principles. The accused's right to be tried by an independent and impartial tribunal must thus be interpreted in this context and in the context of s.11(*f*) of the *Charter*, which contemplates the existence of a system of military tribunals with jurisdiction over cases governed by military law. In view of s. 11(*d*), the content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. An individual who challenges the independence of a tribunal under s. 11(*d*) need not prove an actual lack of independence. The question is whether a reasonable person, familiar with the constitution and structure of the General Court Martial, would perceive that tribunal as independent. The independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator.

[37] In *Généreux*, Lamer C.J. leveraged the conclusion reached by James Fay to explain why a complete severance of the military and its judges was not preferred and in fact suggested that the benefit afforded would be offset by greater disadvantages.

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

[38] However, the SCC in *Généreux* also cautioned that although flexibility was important in applying the conditions to the unique needs of a tribunal such as the court martial, the essence of the conditions themselves needed to be respected in order to ensure the necessary judicial independence:

> A tribunal will not satisfy the requirements of s. 11(*d*) of the *Charter* if it fails to respect these essential conditions of judicial independence. Although the conditions are susceptible to flexible application in order to suit the needs of different tribunals, the essence of each condition must be protected in every case.

Reasonable person test

[39] In order to challenge the independence of a tribunal for the purpose of paragraph 11(*d*), the applicants need not prove an actual lack of independence or impartiality. The

question to be answered is whether an informed and reasonable person would perceive the court martial as independent.

[40] The informed and reasonable person test has been phrased in a number of different ways, but it is clearly an objective test. In *Lippé*, the SCC concluded that the test for both "independence" and "impartiality" is that of an informed person viewing the matter realistically and practically, and having thought the matter through. In *Valente (No. 2)*,[33] the CJ Howland of the Ontario Court of Appeal described the test a little more practically where the reasonable person is one who is informed of the relevant statutory provisions, their historical background, and the traditions surrounding them, and after viewing the matter realistically and practically.

Analysis

[41] The applicants argued that the crux of the challenge before the Court is centred on the tension flowing from the dual role held by military judges who are also serving officers. However, the summary of the above case law[34] suggests that the dual roles are not incompatible by themselves to compromise an accused's paragraph 11(*d*) *Charter* rights. Hence, the fundamental issue this Court must assess is whether the current structure provides a permissible degree of connection between the military chain of command and its judges that still ensures that an accused appearing before a court martial does so before an independent and impartial tribunal.

Administrative independence

First question: Does the OCMJ, to which military judges belong, lack administrative independence from the CAF infringing an accused's right to an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*?

[42] As discussed earlier, the majority of the applicants' argument rests on administrative and institutional independence which falls under the third element set out in *Valente*. Under the third element, the SCC identified those aspects of administrative independence necessary to maintain a constitutionally-sound separation between the judiciary and the executive to include the following:

(a) the assignment of judges to hear particular cases;

(b) the scheduling of court sittings;

(c) the control of court lists for cases to be heard;

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[33] *R. v. Valente* (2). An appeal from this judgment to the Supreme Court of Canada was dismissed, December 19, 1985. S.C.C. Bulletin, 1985, p. 1496. S.C.C. File No. 17583. Reported in full, [1985] S.C.C. No. 77 in the SCC data base. Also see Note at (1985), 1985 CanLII 25 (SCC), 52 O.R. (2d) 779. See Headnote.

[34] This principle was confirmed by both Parliament and the SCC in two separate cases: *Généreux* and in *MacKay*.

(d) the allocation of courtrooms; and

(e) the direction of registry and court staff in carrying out these functions.

[43] The applicants' arguments challenging the administrative independence of the military judiciary were primarily financial and predicated somewhat on the fact that the administrative structure of the OCMJ did not resemble that of civilian courts. The applicants also relied upon the fact that the OCMJ budgetary process lacked similar formal agreements on budget that some civilian courts had. They argued that since the OCMJ budget was not set out by Parliament in the *Appropriations Acts*, and given that the OCMJ was dependent on discretionary funding administered by the Director Budget (DB) and CPROG, it made the OCMJ administratively dependent.

[44] The applicants' arguments alleging the lack of administrative independence based on the financial arguments and budget were supported by little more than assertion and were founded on a belief that other courts have greater control over their operational budgets. When challenged on this by the Court, they were unable to provide any direct evidence of other courts with greater or unlimited financial resources for their own operations nor the legal requirement for it. After evaluating the positions of the applicants against the law, the court found no evidence to support a viable argument particularly given the SCC position that the administration of budgets falls outside the scope of the essential element of administrative independence:

> It is clear from *Valente* that while it may be desirable for the judiciary to have control over the various aspects of financial administration, such as "budgetary preparation and presentation and allocation of expenditure" (pp 709-710), these matters do not fall within the scope of administrative independence, because they do not bear directly and immediately on the exercise of the judicial function.[35]

[45] Secondly, the applicants' arguments alleging a lack of administrative independence relied upon two MOO. The first one is dated 27 September 1997 signed by Arthur Eggleton, then MND which authorized the organization of the Office of the Chief Military Trial Judge, embodying it as a unit in the regular force. The second MOO 2000007 was issued on 7 February 2000 revoking the MOO dated 27 September 1997 and replacing it with an almost identical Order, changing nothing other than clarifying that the CMJ, as the commanding officer of the OCMJ shall not exercise powers with respect to any disciplinary matter. The applicants argue that the revocation of the MOO demonstrates that the MOO establishing the OCMJ as a unit can be amended, changed or revoked at the sole discretion of the executive branch. They argued that the MND has the discretion to disband the OCMJ at any given time, as was done when the MND disbanded the Canadian Airborne Regiment. They argued that if the MND was to do this, it would directly impede military judges in fulfilling their judicial functions. They further argued that the OCMJ is not a body created by

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[35] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 at paragraph 253.

legislation and lacks the legislative protection afforded to other courts such as the Court Martial Appeal Court (CMAC).

[46] Counsel for the applicants referred to recommendations made under two different independent reviews conducted under section 273.601 of the *NDA*. They referred to former Chief Justice Lamer's of the SCC landmark report of 2003[36] which constituted the first independent review of the *NDA* provisions and operation of Bill C-25 as well as the specific recommendations made in the 2011 review conducted by the Honourable Patrick J. LeSage, former C.J. of Ontario[37]. In short, the recommendations made by former C.J. Lamer upon which the applicants rely were the establishment of a permanent military court of record. After having received no update on the status of the former C.J. Lamer's recommendation to establish a permanent military court of record, former C.J. of Ontario LeSage took the position that, in the meantime, interim measures should be implemented to enhance the capacity of military judges to function as a permanent institution. As an example, he recommended that judges be granted legislative authority to convene a court martial immediately after a charge is preferred so the judiciary can judicially manage the case. At paragraphs 54 and 55 of *Pett*, Pelletier M.J. provides an outline of the recommendations that appear to have gone unanswered and are applicable to the cases at bar:

> [54] Former Chief Justice Lamer also recommended in his report that the *NDA* be amended to establish a permanent military court of record to deal most efficiently with difficulties faced by military judges as they try to contort the system of *ad hoc* courts martial into an independent judicial institution. Recommending that a working group be established to identify the most effective framework for its creation, he went on to recommend interim measures to be implemented before the permanent military court could be set up. Some of these interim measures have been put in place, notably by the quick passing of Bill C-60 in June 2008, in response to the CMAC decision in *R. v. Trépanier*, which had brought the court martial system to a halt until Parliament intervened.
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> [55] The second mandated review of the military justice system was completed in 2011 by the Honourable Patrick J. LeSage, former Chief Justice of Ontario. Despite being closely supported by members of the Office of the JAG throughout his work, Justice LeSage stated that he was not given access to any work product related to the establishment of a permanent military court, which he supported. Consequently, as former Chief Justice Lamer had done before, he took position for interim measures to enhance the capacity of military judges to function as a permanent institution. For instance, he recommended that military judges be granted authority in legislation to convene a court martial immediately after a charge is preferred so they can deal with the case using trial management powers, thereby avoiding delay. Justice LeSage also expressed his concerns with the optics of an independent judiciary within a military structure and recommended that there be one distinct rank of "military judge" for all military judges, including the Chief Military Judge. That way, it would be made clear to observers that although the chain of command is important in a military structure, it cannot govern the job performed by military judges, even from within the military

[36] https://www.canada.ca/content/dam/canada/military-grievances-external-review/migration/documents/lamer-eng.pdf
[37] https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/canada-mj-sys/07_LeSage_Report.pdf

> judiciary. The foresight of the LeSage recommendations is obvious when one considers subsequent developments.
> [Endnotes omitted]

[47] Based on the above arguments, the applicants argued that a reasonable, well-informed person would perceive that military judges are too administratively dependent on the executive for the provision of resources necessary to exercise their judicial functions.

[48] Firstly, it is important to highlight that a MOO does not displace the authority set out in the legislative provisions of the *NDA* which enshrines the responsibilities and protections that military judges hold in their adjudicative function. Secondly, the applicants did not provide any evidence to support exactly how a revocation of the OCMJ would directly compromise the adjudicative functions of military judges other than to contend that since the court reporters were service members they could be reassigned at the will of the executive and, consequently, there would be no court reporters available to support courts martial. However, given the legislative and regulatory primacy of the provisions within the *NDA* and the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) which underpin the court martial system and the role and responsibilities of military judges, as well as the Court Martial Administrator, absent any specific evidence to the contrary, the court is entitled to rely upon the presumption that the MND will exercise his duties consistent with the expressed legislative intent of Parliament and as enacted in the *NDA*. The recommendations made by former C.J. Lamer of the SCC and former C.J. Lesage of Ontario, are important; however, their failure to be implemented to date are not in and of themselves sufficient to suggest that the necessary administrative independence is lacking.

[49] In short, the onus was on the applicants to present evidence to overcome the presumption that the military judiciary does not have control over the administrative functions identified in *Valente.* Hence, a reasonable, well-informed person having looked at the *NDA* and its subordinate regulations would perceive that military judges enjoy administrative independence. The Court, therefore, must answer the first question in the negative.

Institutional Independence

Second question: Do military judges, who belong to the OCMJ, a unit of the CAF, lack institutional independence thereby infringing an accused's right to an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*?

Effect of the 15 September 2020 order on judicial independence

[50] The applicants submitted that there is a visible trend of disrespect towards the military judiciary from the executive which is culminated in the CDS Suspension Order issued on 15 September 2020. They argued that military judges called upon the executive to either rescind or revoke the CDS Order; however, the CDS specifically

chose to suspend it pending the outcome of an appeal to the CMAC. The applicants argued that the Suspension Order exhibits resistance to the earlier rulings and refusal to accept the resolution proposed within the respective judicial decisions.

[51] They further argued that this situation is compounded by the fact that the position of CMJ has been effectively left vacant for eight months since the former CMJ retired and no efforts have been made to fill it. There was some suggestion that given the decisions rendered, the executive may have purposefully held back the appointment because they do not approve of the decisions being rendered. Alternatively, there was also suggestion that there could be a perception that if sitting military judges wanted to be selected as the next CMJ, they could be perceived by the reasonable observer to be prone to render a decision to please the executive.

[52] They argued that the wording chosen within the Suspension Order reveals that it was issued for the sole purpose of stopping military judges from entering stays of proceedings. The applicants submitted that the wording in the Suspension Order was deliberately drafted with language to intimidate the judiciary and elevates what was believed to be an oversight in the drafting of the impugned CDS Order to something more sinister. To support their position, they suggested the specific reference to the continued existence of CFOO 3763 reiterates the executive's intent and to send a message to remind military judges that they are subject to discipline by the chain of command. When counsel on both sides were pressed on the legal status of the impugned CDS Order, it was clear that it is of no force or effect.

[53] Given the emotive nature of this subject seemingly targeted at the military judiciary, I conducted my analysis without questioning the motives put forward by the applicants. The Court simply accepted as a fact that the impugned CDS Order is no longer in force and then proceeded to an examination of the legislative provisions governing the tribunal's constitution and proceedings. In doing so, the Court benefited from the analysis in the *Pett* and *D'Amico* decisions.

Review of *NDA* provisions and common law

[54] Since the SCC decided the case of *Généreux*, the *NDA* has been substantially revised to enhance judicial independence of military judges. Some of the worthy milestones were laid out by Pelletier M.J. in the *Pett* decision:

> [52] An important landmark on the road to judicial impartiality came in 1997 with the release of the First and Second Dickson reports as well as the Somalia Inquiry Report. These reports addressed the fundamental importance of independence of the military judiciary. Many of the recommendations found in these reports were implemented in Bill C-25 and consequential QR&O amendments, together representing the significant military justice reform of 1997-1999. Yet, these important developments were not sufficient to alleviate concerns regarding institutional impartiality.
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> [53] Indeed, the 1997-1999 reforms were independently reviewed by former Chief Justice Lamer in his landmark report of 2003 constituting the first independent review of the provisions and operation of Bill C-25. The *Lamer Report* remarked that despite

> significant improvements, the measures put into place to ensure the independence of the military judiciary remain inadequate. A recommendation was made to confer security of tenure to military judges until retirement. That recommendation had not been implemented by the time the issue was addressed by the CMAC in *R. v. Leblanc*, which found the five-year terms in force at the time to be unconstitutional, giving Parliament six months to establish an adequate scheme. Legislation to accomplish this security of tenure requirement came into force a few days before the deadline.
> [Footnotes omitted]

[55] Similarly, in the case of *D'Amico*, I highlighted comparators from the protections in the *NDA* for military judges with those set out for civilian judges in the *Judges Act*[38].

> [15] Many of the improvements to judicial independence are captured within the *NDA* from the point of appointment to retirement. The *NDA* prescribes subtle differences between the appointments of military judges in comparison with those of their civilian counterparts.
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> [16] For example, like their civilian counterparts, military judges are appointed based upon merit by the Governor in Council and are required to have at least ten years of standing at the bar of a province prior to their appointments, however, military judges are also required to have a minimum of 10 years' experience serving as a military officer, a requirement that sets them apart from their civilian peers (*NDA*, subsection 165.21(1)). Military judges have security of tenure until retirement, but the *NDA* establishes that retirement be at 60 years of age, while it is from 70 to 75 years for their civilian counterparts (see, for example, section 8 of the *Judges Act*).
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> [17] Similarly, while it is the Canadian Judicial Council that holds jurisdiction to recommend the removal of a civilian judge (see sections 63 to 66 of the *Judges Act*), it is the Military Judges Inquiry Committee, composed of justices of the Court Martial Appeal Court (CMAC) who fulfil this same function for military judges (see *NDA* section 165.31).

[56] Pursuant to subsection 165.21 (2) of the *NDA*, prior to commencing their roles, military judges take the following oath of office:

> I . . . solemnly and sincerely promise and swear (or affirm) that I will impartially, honestly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as a military judge. (*And in the case of an oath:* So help me God.) [Emphasis mine]

[57] The language in the required oath for military judges is consistent with the approach taken for other federally appointed judges. Importantly, both the *Judges Act* and the *NDA* enforce the principle that once appointed as a judge, the judicial role has primacy. To solidify this, the *Judges Act* generally prohibits extrajudicial activities unless expressly authorized by the relevant federal or provincial legislation.[39]

> **Extra-judicial Employment**

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[38] *Judges Act*, R.S.C. 1985, c. J-1
[39] *Ibid* section 55.

> **Judicial duties exclusively**
>
> **55** No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

[58] By comparison, subsection 165.23 (1) of the *NDA* states that military judges shall preside at courts martial and shall perform other judicial duties under this Act that are required to be performed by military judges. Further, subsection 165.23(2) of the *NDA* stipulates that in addition to their judicial duties, military judges shall perform any other duties that the Chief Military Judge may direct, but those other duties may not be incompatible with their judicial duties. [Emphasis added]

[59] In short, as with their civilian judicial counterparts, once appointed, section 165.23 of the *NDA* requires the primary role of a military judge to be the performance of judicial functions. They are tasked with interpreting and applying the law to ultimately decide on the cases they hear. Although the *NDA* provides some leeway for taskings by the CMJ, any other function that military judges may be asked to perform are subordinated to core judicial functions and the *NDA* prohibits them from engaging in duties incompatible with judicial duties.

[60] A military judge also has the same immunity from liability as a judge of a superior court of criminal jurisdiction.[40] Immunity is crucial if military judges are to fulfil their sworn duty to assess the evidence and apply the law. Without this protection, military judges might be prevented from freely expressing themselves in their reasons as to whether they believe a witness is telling the truth. However, the impugned CDS Order as drafted directly implied that military judges were not immune under the CSD in relation to what they say and do in the performance of judicial duties.[41]

[61] Consequently, it is absolutely imperative that any interpretation of the *NDA* be consistent with the legislative provisions set out within the *NDA* itself, but most importantly, it must comply with the *Charter.* If the CDS Order had been allowed to stand, the impugned CDS Order not only directly violated section 165.231 of the *NDA* denying military judges the necessary immunity required in the performance of their judicial duties, but it also violates an accused's *Charter* right to be tried by an independent and impartial tribunal. It is worthy to note that without the existence of the CDS Order and pursuant to legal principles and interpretations developed by military judges, the provisions of the *NDA* would then operate according to the *Charter* and the common law.

[62] In addition to the above critical provisions in the *NDA*, the Court would be remiss not to highlight that there are additional provisions that further strengthen the independence of the military judiciary:

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[40] *NDA* section 165.231.

[41] See *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330 and paragraphs 71-72 of *Pett*.

(a) military judges have a separate pay scheme[42] ;

(b) a military judge can only be released voluntarily[43];

(c) a military judge cannot be the object of a Relief from Performance of Military Duty[44];

(d) military judges have a separate scheme for grievances[45]; and

(e) no personal report, assessment or other documents shall be completed for a military judge if such a document can be used in whole or in part to determine the training, posting or rate of pay of the officer, or whether the officer is qualified to be promoted[46] .

[63] Recognizing that the *NDA* does not identify the priority that should be afforded between the MJIC and the CSD, in *Pett*, Pelletier M.J. conducted a very comprehensive analysis in recommending a solution to correct the identified impasse:

> [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.

[64] Nonetheless, in the *Pett* decision, notwithstanding the fact that the CDS Order dated 14 June 2019 was before him as evidence, Pelletier M.J. concluded that, absent the overbroad CDS Order dated 2 October 2019, there were no other impediments to judicial independence:

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

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[42] *NDA* section 165.33 and QR&O Chapter 204.
[43] QR&O articles 15.01, 15.17 and 15.18.
[44] QR&O article 19.75.
[45] *NDA* section 29.101.
[46] QR&O articles 26.10 and 26.12.

> martial presided by military judges, are as free as possible from the interference of the military hierarchy.
>
> [104] This conclusion entails that from a legislative and regulatory perspective, the structure applicable to the discipline of military judges meets the requirement of judicial impartiality, as long as the significant safeguard provided by the Military Judges Inquiry Committee is allowed to operate efficiently. This safeguard ensures that military judges are immune from any disciplinary or administrative measures initiated by the executive and prevents any reasonable apprehension of bias from forming in the mind of a reasonable, well-informed person looking at the structure governing the military judiciary and the courts martial system.

[65] Further, although the *Pett* decision was necessarily lengthy and fulsome given the task it faced, in *D'Amico*, I succinctly summarized the *ratio decidendi* of *Pett* into a few short bullet points specifically to facilitate the executive in resolving the violation[47]:

> (a) Any CDS order (issued by the Executive) that is focused solely on military judges in their function or role as military judges must be found of no force and effect;
>
> (b) Any CDS order that applies to all military members and officers, but in its operation, happens to capture military judges in their role as officers in the CAF, does not present the same risk and systemic concern undermining the independence of military judges;
>
> (c) The CDS Order 2019 conflicts with and undermines the statutory intention set out by parliament in the *NDA* that military judges are to be judged by their judicial peers with respect to their judicial conduct; and
>
> (d) The CDS Order 2019 is declared to be of no force and effect.

[66] However, silence on the part of the executive reigned; there was no reaction to the pronouncement of the judicial principles in *Pett*, nor was there any reaction to the six follow-up decisions of *D'Amico*, *Bourque*, *Crépeau*, *Edwards*, *Fontaine* and *Iredale* until news of the stays of proceedings propagated and became known to the general public.

[67] Counsel for the applicants argued that the current turmoil in the military justice system was caused by the pursuit of the charges against the former CMJ, Colonel Mario Dutil. They argued that alone illustrated the power and intent of the executive to discipline military judges. In fact, the executive relied upon an earlier version of the impugned CDS Order to facilitate the laying of charges against the CMJ at the time. The applicants argued, "What was a sleepy backwater of the theoretical is now a reality in full public view. We cannot now unring the bell."

[68] During submissions, the Court made it clear that the *Dutil* case is more properly the subject of a separate study; however, counsel for the applicants were insistent upon its evidentiary value to demonstrate the realistic peril and the vulnerability to which the military judiciary is exposed that a reasonable person cannot ignore.

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[47] *D'Amico*, *supra* note 8 at paragraph 42.

[69] Simply put, the failed attempt by the executive to pursue charges against the former CMJ did not have the benefit of recent courts martial jurisprudence. The Canadian system of government has three branches: the legislative; the executive; and the judicial. In its simplest form, in the military context, the legislative branch of Parliament enacted the *NDA*; the chain of command (executive) administers and enforces it, and the military judges are responsible for interpreting and applying the law set out within it. In interpreting and applying legislation, absent applicable legislative guidance, like their civilian counterparts, military judges are routinely forced to craft their own workable common law principles to fill legislative gaps.

[70] Consequently, with respect to deconflicting and prioritizing the competing disciplinary regimes between the MJIC and the CSD in the *NDA*, given the absence of specific legislative direction, military judges were left with no choice but to survey the law and apply the appropriate legal principles to interpret and craft a decision. The interpretations and workable principle(s) developed primarily in *Pett* and then confirmed with slight variation in *D'Amico* now contribute meaningfully to the common law of judicial independence until they are displaced either on appeal or by legislation. At paragraph 47 of *Iredale*, Pelletier M.J. writes:

> 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*.

[71] As the exhaustive summary of the case law presented earlier in this decision suggests, it is unacceptable for any external entity to be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function. Hence, while military judges are still serving as judges, the first stop regarding <u>any discipline matter</u> must be the MJIC. To prioritize otherwise is inconsistent with the substantial paragraph 11(*d*) *Charter* jurisprudence as well as the *NDA* provisions that, notwithstanding the fact they are military officers, prioritizes the role and responsibilities of military judges directly in the legislation. In short, the primary authority for exercising disciplinary authority against military judges must lie first with the MJIC. To place any disciplinary authority ahead of the MJIC calls judicial independence into question and infringes the right of an accused under paragraph 11(*d*) of the *Charter*.

[72] If the CAF and the government were not content with the common law principles decided in *Pett*, they should have done something. Unfortunately, they chose to do nothing and it was that choice that led directly to the four subsequent stays of proceedings. They could have commenced action to override the principles enacted by introducing legislation or even proposing a new regulation under the QR&O that provided direction in compliance with paragraph 11(*d*) of the *Charter*. This Court has received no evidence of any action taken other than the 15 September 2020 Suspension Order.

[73] Counsel for the applicants have strongly advocated that legislation is needed to clarify the competing tension between the two disciplinary regimes, being the CSD and the MJIC. Although that is the ideal, until that is done, as long as the more recent judicial pronouncements remain valid, they themselves provide appropriate direction in resolving the tension. Recognizing that there is no express provision in the *NDA* and its supporting regulations to describe the priority of the two disciplinary systems, Pelletier M.J. provided the following interpretation in *Pett*:

> [112] The following legal considerations militate for the application of the Military Judges Inquiry Committee scheme in priority over the military disciplinary system applicable to all officers:
>
> > (a) First, the express mention in the *NDA* of an exceptional treatment for military judges in subsection 164(1.3) to the effect that a superior commander may not try a military judge by summary trial. That points to the legislator's intention that military judges are not to be treated as any other officer under the Code of Service Discipline but as members of the judiciary.
> >
> > (b) Second, the provisions in the *NDA* to the effect that the Code of Service Discipline does not affect the jurisdiction of any civil court to try a person for any offence. As evidenced by the safeguards discussed above and the similar duties of military judges in relation to civilian judges, one can deduce that military judges should be treated the same as any other judicial officials when suspected of having committed and *[sic]* offence: civilian courts' jurisdiction should first be considered when the alleged misconduct constitutes an offence triable by that court.
> >
> > (c) Third, the operation of the Military Judges Inquiry Committee in relation to issues of medical fitness and retirement age reveal that the Committee's process must take priority over any process engaged by the executive.
>
> [113] These legal considerations are enhanced by practical considerations supporting the conclusion that the Military Judges Inquiry Committee process should be allowed to come to its proper conclusion before the military justice system process applicable to all officers is applied. It is only when the military judge is removed following a process governed by his peers that he or she should be treated as an officer and as required be charged and dealt with under the Code of Service Discipline. This sequence in proceedings is the only one which allows both the judges and officers respective disciplinary processes to run their course fully to their logical conclusion.
> [Endnotes omitted]

[74] In summary, after identifying a number of sentencing hurdles that a court martial would be confronted with in trying a sitting military judge[48], Pelletier M.J.

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[48] *Pett*, *supra* note 7, paragraph 114 – "Should a guilty verdict ensue, the court would not be able to fully consider an adequate sentence as imposing a number of available punishments from the list at section 139 of the *NDA* would cause significant practical difficulties both for CAF authorities than for any subsequent Military Judges Inquiry Committee that would have to be convened should a military judge be found guilty of an offence. The imposition of punishments of dismissal, dismissal with disgrace and, as far as the Chief Military Judge is concerned, reduction in rank would cause difficulties on two fronts. On the administrative front, dismissals are not effective unless and until they are administratively implemented. Implementation would be impossible as a military judge cannot be released under item 1 of the Table to

concluded that the more respectful approach adherent to legislative intent is to let the MJIC disciplinary process unfold first and should the military judge be removed from the appointment as a military judge, if warranted, the executive may proceed with charges under the CSD.[49]

[75] Judicial independence demands that when the judicial conduct of a particular military judge is questioned, the alleged misconduct should be reviewed by the MJIC first and foremost. In fact, Division 6 under Part III of the *NDA* which sets out the CSD also sets out the specific role and powers for the MJIC. This is likely not by accident.

Security of tenure

[76] In their written and oral submissions, the applicants submitted that if the MJIC was not prioritized over the application of the CSD with respect to a sitting judge, it has the potential to undermine the element of security of tenure necessary to ensure the judicial independence of military judges. As I stated in *D'Amico*, the *NDA* must be interpreted in a way that it does not frustrate the paragraph 11(*d*) *Charter* rights of the accused as well as the intended purpose for the MJIC which must be permitted to operate as a priority. For example:

> [71] The *NDA* makes it clear that a decision to remove a judge from office belongs exclusively to the Governor in Council. Nonetheless, pursuant to the CDS Order 2018, DMP's final decision to prefer charges against the C.M.J. combined with the decision to unilaterally pursue the charges exclusively under the military justice system had the second order effect of removing the C.M.J. from his judicial functions. When exercised, the impugned CDS Order 2019 may similarly interfere with and frustrate this intended purpose of the *NDA*.

[77] The A/CMJ's decision in *Edwards* also recognizes this principle:

> [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.

[78] In short, the evidence confirms that a decision to pursue charges under the CSD against a military judge has the second order effect of removing the military judge from

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QR&O article 15.01. If the sentence was to be implemented, the dismissal would render any subsequent Military Judges Inquiry Committee moot. As for reduction in rank imposed on the Chief Military Judge, any implementation would cause the incumbent to be effectively removed from his office as the Chief Military Judge must be of no less than the rank of colonel. [Endnote omitted.] There is no provision allowing the Chief Military Judge to be removed from that office or even resign from it and revert to being a puisne military judge. These are two distinct offices."

[49] *Pett*, *supra* note 7, paragraph 116.

their judicial functions. Further, due to the unique modalities of the preferral process, a unilateral DMP delay in assessing the case and making the preferral can further prolong the military judge's removal from his or her judicial duties even when the allegations are so minor that they would not constitute an offence in any other court of law. This lack of judicial oversight over the process was recognized as a deficiency in the military justice system by both the former Lamer C.J. of the SCC and the former Lesage C.J of the Ontario Appeal leading to their recommendations for the creation of a permanent court, as well as interim measures to give effect to military judges' ability to manage cases from the moment that charges are laid.[50]

Effect of the CFOO 3763

[79] Counsel for the applicants strongly argued that the matter before the Court is different than the issue considered in the cases of *Pett* and *D'Amico* because the courts in those cases did not consider the effect of the MOO for the Office of the Chief Military Trial Judge (as it was referred to at the time) as well as the CFOO 3763 on the accused paragraph 11(*d*) *Charter* rights. They argued that by virtue of the rank military judges hold and the fact that they belong to Canadian Forces Base Ottawa/Gatineau they are automatically captured by CFOO 3763 and therefore subject to the CSD administered by the executive. They argued that the effect on the accused is identical as it was with the CDS Order because under CFOO 3763, the CMJ, in the rank of colonel, would have the exact same commanding officer for the administration of discipline. Consequently, counsel for the applicants argued that the Court is bound by the result in *Pett* and *D'Amico* and the subsequent cases and must order a stay.

[80] In short, both CFOO 3763 and the CDS Order June 2019 were adduced in evidence before the courts in both *Pett* as well as *D'Amico* and the wording of the respective military judges reflect that they were in fact considered.

[81] Despite the slight variation provided for in *D'Amico* regarding the application of the CSD to sitting military judges in exceptional situations, the ultimate conclusion was the same. In both cases, it was the CDS Order that attracted the concern because of its overbreadth and the fact that it purported to displace the role of the MJIC.

[82] More specifically, at paragraph 116 of *Pett*, Pelletier M.J. clearly debunks this argument when he states that it is not the inherent conflict between the MJIC and the CSD that violates judicial impartiality, but rather it was the CDS Order itself that triggered the infringement. He writes:

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

[50] *Lamer Report*, supra note 36 at pages 27-28, recommendations 13, 14 and 15 and *LeSage Report, supra note 37* at pages 37-41, recommendations 21 and 22.

[83] Although the CDS Order June 2019 happens to capture military judges in their role as officers, it does not explicitly provide broad authority over "any disciplinary matter" nor does it refer specifically to military judges. In fact, when the CDS Order June 2019 is read with the statutory regime set out for military judges in the *NDA* and the common law, it does not present the same risk and systemic concerns.

[84] It is a fundamental rule that all members within the CAF community are bound by and subject to Canadian law at all times. The CSD provides a mechanism to ensure that wherever a member serves, he or she is always bound by Canadian law. There is an explicit understanding that such adherence applies to all those persons subject to the CSD[51], no matter what their position, ensuring that no one is above the law. Essentially, this means that the judges themselves are also accountable.

[85] However, the concept of equality before the law, does not demand that every member of the CAF be treated identically or they must be subjected to the exact same process. As an example, the military justice system currently provides for different tribunals (summary trials and courts martial) where the jurisdiction is based partially on the rank of an accused. As d'Auteuil A/C.M.J. clarified at paragraph 50 of *Edwards*, the MJIC is also part of the CSD as it is embedded at Part III of the *NDA* – 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.

[86] Consequently, a finding that, based on their position, military judges must first appear before the MJIC which is a disciplinary tribunal specifically legislated to review judicial conduct cannot be seen to violate principles of equality. When all the legislative provisions are read together and applied with the surrounding jurisprudence, it is apparent that military judges are not above the law; however, based on their specific role and appointment, the route that must be followed in the application of the CSD is necessarily different.

[87] As Pelletier M.J. concluded in *Pett*, there is the potential for uniquely military offences of a minor nature to escape being addressed under the CSD:

> [132] I fully realize that the impossibility of laying charges against military judges while in office may lead to strictly military offences of a minor nature, hence of insufficient gravity to warrant removal, not being addressed under the Code of Service Discipline. This is a reasonable price to pay to protect the rights of accused to be tried before an independent and impartial military tribunal. If there is anyone who should be exempted from such an exercise due to the function they occupy it is military judges who can hear and determine the most serious of crimes and impose the most severe of sentences. A reasonable observer would understand that an officer holding the office of military judge

[51] *NDA* section 60 sets out all those persons and conditions under which persons are subject to the CSD.

> must be exempt from being charged under the Code of Service Discipline and, consequently may not be fully accountable for such offences.

[88] This Court has always stated that there is no better way to pragmatically evaluate hypotheticals than by applying them through the prism of facts.

[89] As an officer wearing the rank of commander, if I was not a military judge and I faced an alleged violation of a minor military offence such as an allegation contrary to section 129 of the *NDA* for conduct to the prejudice to good order and discipline, based on my rank, I could be tried at summary trial by a superior commander, who is non-legally trained and wears at least the rank of colonel. If found guilty, a potential sentence might include a severe reprimand, reprimand and/or a fine.

[90] However, as a military judge, the same allegation of misconduct would be brought to the MJIC, a committee comprised of three judges from the CMAC with all the same powers, rights and privileges, including the power to punish for contempt, as are vested in a superior court of criminal jurisdiction, which would consider the matter. As a formal judicial disciplinary committee, comprised of judicial peers, the MJIC may recommend to the Governor in Council that I be removed from my position if, in its opinion, I am guilty of misconduct, failed in the due execution of my judicial duties, or having been placed, by my conduct or otherwise, in a position incompatible with the due execution of my judicial duties. Although it is unlikely that the alleged violation of a minor nature might lead to a recommendation that I be removed from the position, the fact that the MJIC was engaged, investigated and reviewed the allegation is no less damaging to me than if I was to receive a reprimand from a superior commander.

Summary of case law

[91] In short, the jurisprudence on paragraph 11(*d*) of the *Charter* must be read together with the provisions of the *NDA* to have a complete understanding of the necessary protections that must be afforded to military judges in order to protect an accused's paragraph 11(*d*) *Charter* rights.

[92] Adjudicative independence guarantees that military judges are both free and obliged to render decisions on their own, based only on the evidence and the law. Their judgments must be perceived to be free from fear or favour from the Executive. The Rule of Law is meaningless if an accused does not have confidence that the military judge presiding over his or her court martial has an open mind and is free from the influence of those involved in the case including the chain of command who might have a vested interest in the final outcome.

[93] The SCC has repeatedly recognized not only the importance of maintaining a military discipline system and in the context of the system, it accepts that members of the military are involved in the mechanisms itself. As stated in *Généreux*, despite a court martial being a different tribunal, the judicial independence of military judges must nonetheless fulfil the essential conditions stated in the constitutional principle and the decisions of the SCC.

[94] Although military judges must be independent, that does not mean they are not accountable for their actions. This requirement does not give military judges the right to do whatever they wish. Many measures exist to ensure that military judges are held accountable. Probably the greatest limitation is the absolute requirement that cases be decided in open court according to the law and the evidence. Even during these difficult times with the COVID-19 pandemic, court martial proceedings remain open to the public through virtual access. Statistics have shown that despite the shift to virtual attendance, courts martial proceedings are extremely well attended. Consequently, if interested, CAF members, the chain of command, the general public and journalists can attend the proceedings to judge for themselves whether justice has been served. Private hearings are extremely rare and only held when required by law. Further, military judges have a duty to provide written reasons for their judgments delivered in courts martial and these reasons are published and available in the public domain on multiple websites (OCMJ and CanLII).

[95] To further ensure military judges are accountable, their decisions are appealable to the CMAC. Both parties are provided government resources to fund an appeal and, if the CMAC finds a legal error has been made by the military judge, the ruling could be altered or reversed.

[96] Most importantly, the conduct of military judges, occurring both inside and outside of their courtrooms, can be investigated by MJIC. Subsection 165.32(2) of the *NDA* provides that "on receipt of any complaint or allegation in writing made in respect of a military judge", the inquiry committee has the ability to "commence an inquiry as to whether the military judge should be removed from office." Similarly, the MJIC shall commence an inquiry as to whether a military judge should be removed from office upon receipt of a request in writing made by the MND. Pursuant to subsection165.31(3) of the *NDA*, the MJIC has "the same powers, rights and privileges – including the power to punish for contempt – as are vested in a superior court of criminal jurisdiction with respect to […] all […] matters necessary or proper for the due exercise of its jurisdiction." Finally, the MJIC "shall provide to the Minister a record of each inquiry and a report of its conclusions. If the inquiry was held in public, the inquiry committee shall make its report available to the public."[52]

[97] For all of the above reasons, military judges are, and are seen to be, accountable for their adjudicative functions. Now that the CDS Order is no longer in force and the MJIC is able to operate as it is established within the *NDA*, then the Court finds that there are sufficient guarantees of judicial independence to allow military judges to be perceived as independent and impartial. Consequently, the Court must answer the second question in the negative.

Third question: Do sections 12, 18 and 60 of the *NDA* violate paragraph 11(*d*) of the *Charter*?

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[52] *NDA*, subsection 165.32(8).

[98] In both *Crépeau* and *Iredale*, both military judges dismissed the claims of unconstitutionality related to sections 12, 18 and 60 of the *NDA*. In both the cases, the military judges found that the current statutory framework offers sufficient guarantees of judicial independence. In *Crépeau*, the A/CMJ concluded the following:

> [78] À la lumière de mes commentaires sur les dispositions sur le comité d'enquête sur les juges militaires, j'en viens à la conclusion que les articles 12, 18 et 60 de la *LDN* ne contreviennent pas au droit de la requérante à un procès par un tribunal indépendant et impartial prévu à l'alinéa 11*d*) de la *Charte*.
>
> [79] En effet, comme je l'ai mentionné précédemment, puisqu'il n'est pas permis au Conseil du Trésor de fixer les taux et conditions de versement de la solde des juges militaires sans que le CERJM ait d'abord procédé à l'examen de la question et fait ses recommandations, il n'est plus permis à la chaîne de commandement de prendre quelque mesure disciplinaire que ce soit à l'égard d'un juge militaire alors que cette question doit être traitée exclusivement par le comité d'enquête sur les juges militaires.
>
> [80] Comme je l'ai déjà dit, les articles 165.31 et 165.32 de la *LDN* qui portent sur le comité d'enquête sur les juges militaires font partie intégrante du CDM et assurent ainsi qu'il n'y aura pas d'ingérence exercée par la hiérarchie militaire à l'égard des juges militaires. L'existence de telles dispositions a pour effet de restreindre l'effet combiné des articles 12, 18 et 60 de la *LDN* à l'égard des juges militaires, assurant ainsi le respect du droit constitutionnel de la requérante à un procès par un tribunal indépendant et impartial.
>
> [81] La prétention de la requérante quant à l'inconstitutionnalité des articles 12, 18 et 60 de la *LDN* au regard de l'alinéa 11*d*) de la *Charte* est donc rejetée.

[99] In the case of *Iredale*, Pelletier M.J. stated the following at paragraph 39:

> [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.

[100] Further, since this Court concluded that there are sufficient guarantees of judicial independence to allow military judges to be perceived as independent and impartial, and counsel have provided no rationale to depart from the declarations made by my brother judges in *Crépeau* and *Iredale,* the Court is satisfied that the general *NDA* provisions of sections 12, 18, and 60 of the *NDA* are <u>not</u> unconstitutional[53].

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[53] Courts martial apply "judicial comity" following the same decision as a judge of the same court, unless it is in the interests of justice to do otherwise (see *R. v. Caicedo*, 2015 CM 4018 at paragraphs 20 and 21). A military judge should only decline to follow a prior holding of another military judge on a point of law if there is a contradictory decision from another court on the same point, the decision is contrary to binding authority of the SCC or was made *per incuriam*.

Similarly, for the same reasons provided within those decisions, I also conclude that section 17 is constitutional.

[101] After a thorough review and for the reasons stated above, I must also answer the third question in the negative.

[102] Given the silence in the *NDA* on the application of the CSD to military judges, courts martial were forced to craft legal principles intended to protect an accused's paragraph 11(*d*) *Charter* rights. Pursuant to section 60 of the *NDA*, military judges remain subject to the CSD; however, in light of the priority that must be provided to the MJIC and to avoid infringing an accused's paragraph 11(*d*) *Charter* rights, as stated in *Pett*, the following legal principles apply:

(a) Military judges are liable to the MJIC for their general conduct both as officers and judges as well as their conduct in the execution of their judicial duties. The MJIC has broad authority which includes the power to consider whether a military judge may remain in their role, with respect to infirmity, misconduct, performance in the execution of their judicial duties with respect to their failure to satisfy the physical and medical fitness standards applicable to officers;

(b) In the event of an allegation of a criminal nature, complaints are best directed to civilian police authorities and dealt with through the civilian criminal justice system; and

(c) Military judges remain subject to the CSD; however, in light of the priority that must be provided to the MJIC and consistent with the legal principles crafted to protect an accused's paragraph 11(*d*) *Charter* rights as developed in *Pett* and *D'Amico*, the following constraints exist:

i. With respect to an alleged service offence committed while serving as officers, absent trying the matter under the civilian justice system, it may be dealt with under the CSD once military judges are no longer serving as judges or they have retired from the CAF; and

ii. In exceptional circumstances, an allegation of a criminal offence that occurred outside of Canada and where there is no other Canadian court to assume jurisdiction may be dealt with under the CSD. However, immediately after the laying of charges, the prosecution must immediately bring the matter before a military judge to ensure appropriate judicial oversight of the process[54];

Final comments

[54] *D'Amico, supra note 8 at paragraph 71*.

[103] In order for all CAF members to be confident that their cases at court martial will be decided fairly and impartially, the principle of judicial independence must not just exist, it must be seen to exist. In fact, it needs to be apparent that the court martial system is not only fair, but it must also be obvious that the military judge trying their case is shielded from outside influence so he or she may render a decision without fear or favour.

[104] The military judiciary is extremely small as it is comprised of only four judges, who quite frankly have no power base. As such, they must continually strive for public confidence in performing the work and duties assigned to them. Travelling across the country on a weekly basis, their judicial work unfolds in *ad hoc* courtrooms and in complete isolation from each other.

[105] Further, as do their civilian counterparts, military judges must exercise restraint, especially when exterior noise is deafening. Consequently, this necessary and deliberate silence of judges means that when a judiciary is targeted, others must come to their defence[55]. For the civilian judiciary, this means that the public, the Bar, and the legal academic community assume this responsibility, and they are extremely vigilant, protesting and effectively coming to their defence whenever members of Canada's judiciary fall victim to unfair, ill-informed, or unwarranted attack.[56]

[106] Despite the barrage of applications challenging the independence of the military judiciary, for months it was met with silence and indifference from inside the CAF. The sole concern came from a handful of external lawyers and academic commentators. Sadly, it was the institutional indifference and lack of interest in remedying the situation that fuelled the applicants' arguments and stalled the military justice system. If the CAF and the OJAG truly believe in its military justice system, they must do better.

[107] Moving forward, in order to build confidence in the independence of military judges and the court martial system, it is important that the independent work of the court be openly communicated to the public in a concerted fashion. Military judges write their decisions in such a way to not just explain to the accused how they arrived at their decision, but they also try to educate the public and the affected military community by providing detailed reasons. The court martial decisions provide the strongest evidence of both the independence and impartiality of military judges as well as the fairness of the court martial process.

[108] Finally, after a fulsome review of the evidence, the case law and the careful consideration of the arguments submitted by counsel, the Court has answered the three questions in the negative.

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[55] Canadian Judicial Council, *Why is Judicial Independence Important to You?* (Ottawa: Canadian Judicial Council, 2016) at page 28.
[56] *Ibid*.

FOR THESE REASONS THE COURT:

[109] **DISMISSES** the plea in bar application and preliminary applications.

Dated this 23rd day of October, 2020 at the Asticou Centre, Gatineau, Quebec

"S.M. Sukstorf, Commander"
Presiding Military Judge

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Colonel D. Martin, Lieutenant-Commander J. Besner, Major A. Dhillon, Major P. Germain, Major L. Langlois, Prosecutors and Counsel for the Respondent

Lieutenant-Commander E. Léveillé and Captain M. Melbourne, Defence Counsel Services, Counsel for Master Warrant Officer J. MacPherson, Accused and Applicant

Major A. Bolik and Captain D. Mansour, Defence Counsel Services, Counsel for Warrant Officer S. Chauhan, Accused and Applicant

Major Gélinas-Proulx, Defence Counsel Services, Counsel for Private J.L., Accused and Applicant

ANNEX A

UNCLASSIFIED

SANS CLASSIFICATION

Chief of the Defence Staff

Chef d'état-major de la Défense

National Defence Headquarters
Ottawa, Ontario
K1A 0K2

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

ORDER

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

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

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

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

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

ORDRE

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

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

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

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

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

National Defence Défense nationale

UNCLASSIFIED

Canada

SANS CLASSIFICATION

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

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

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

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

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

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

Le général

J.H. Vance
General

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

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

ANNEX B

ORDER

SUSPENSION OF THE ORDER – DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763, DATED 2 OCTOBER 2019

Whereas in *R v. Edwards*, *R. v. Crépeau*, *R. v. Fontaine*, and *R. v. Iredale*, the military judges found that the accused persons' right under paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* to be tried by an independent and impartial tribunal has been violated by the Order issued by the Chief of the Defence Staff on 2 October 2019 titled *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*;

And whereas the military judges in *R v. Edwards*, *R. v. Crépeau*, *R. v. Fontaine*, and *R. v. Iredale* ordered a stay of proceedings in those cases owing to that violation;

And whereas the Minister of National Defence has filed a notice of appeal of the decisions in *R. v. Edwards*, *R. v. Crépeau*, *R v. Fontaine, and R. v. Iredale*;

And whereas it is anticipated that military judges will continue to order stays of proceedings on the basis that the accused persons' right under paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*

ORDRE

SUSPENSION DE L'ORDRE – DÉSIGNATION DE COMMANDANTS À L'ÉGARD DES OFFICIERS ET DES MILITAIRES DU RANG QUI FIGURENT À L'EFFECTIF DU CABINET DU JUGE MILITAIRE EN CHEF ID DU SERVICE 3763, DATÉ DU 2 OCTOBRE 2019

Attendu que dans *R. c. Edwards*, *R. c. Crépeau*, *R. c. Fontaine*, et *R. c. Iredale* les juges militaires ont conclu que le droit des accusés d'être jugé par un tribunal indépendant et impartial, tel que prévu à l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*, a été enfreint par l'ordre du chef d'état-major de la défense du 2 octobre 2019 intitulé *Désignation de commandants à l'égard des officiers et des militaires du rang qui figurent à l'effectif du Cabinet du juge militaire en chef ID du service 3763*;

Attendu que suite à cette violation, les juges militaires dans *R c. Edwards*, *R. c. Crépeau, R. c. Fontaine,* et *R. c. Iredale* ont ordonné un arrêt des procédures;

Attendu que le ministre de la Défense nationale a déposé un avis d'appel des décisions rendues dans *R c. Edwards*, *R. c. Crépeau*, *R. c. Fontaine,* et *R. c. Iredale*;

Attendu qu'il est anticipé que les juges militaires continueront d'ordonner un arrêt des procédures parce que le droit des accusés prévu par l'alinéa 11*d*) de la *Charte canadienne des droits et libertés* est enfreint

is violated by the Order titled *Designation of Commanding Officers with respect to Officers and Non-Commissioned Members on the Strength of the Office of the Chief Military Judge Dept ID 3763*, dated 2 October 2019;

And whereas the military justice system is essential to maintain the discipline, efficiency, and morale of the Canadian Armed Forces;

And whereas the Canadian Forces Organization Order 3763 – Office of the Chief Military Judge remains in effect;

Therefore, I suspend the Order – *Designation of Commanding Officers with respect to Officers and Non-Commissioned Members on the Strength of the Office of the Chief Military Judge Dept ID 3763*, dated 2 October 2019, pending the final determination of the appeals in *R. v. Edwards*, *R. v. Crépeau*, *R. v. Fontaine*, and *R. v. Iredale*.

Ottawa, 15 Sep, 2020.

par l' Ordre intitulé *Désignation de commandants à l'égard des officiers et des militaires du rang qui figurent à l'effectif du Cabinet du juge militaire en chef ID du service 3763*, daté du 2 octobre 2019;

Attendu que le système de justice militaire est essentiel au maintien de la discipline, l'efficacité et le moral des Forces armées canadiennes;

Attendu que l'Ordonnance d'organisation des Forces canadiennes 3763 – Cabinet du juge militaire en chef demeure en vigueur,

À ses causes, je suspends l'Ordre – *Désignation de commandants à l'égard des officiers et des militaires du rang qui figurent à l'effectif du Cabinet du juge militaire en chef ID du service 3763*, daté du 2 octobre 2019, jusqu'à ce que la décision finale soit rendue sur les appels *R. c. Edwards*, *R. c. Crépeau*, *R. c. Fontaine*, et *R. c. Iredale*.

Ottawa, le 15 Sep 2020.

Le chef d'état-major de la défense

General/Général
J.H. Vance
Chief of the Defence Staff

ANNEX C

Dept ID/ID Svc 3763

MINISTERIAL ORGANIZATION ORDER 2000007

ARRÊTÉ DE CONSTITUTION 2000007

I, Arthur Eggleton, Minister of National Defence, do hereby:

a) pursuant to subsection 17(1) of the National Defence Act, revoke all previous Ministerial orders authorizing the organization of the Office of the Chief Military Trial Judge.

b) pursuant to subsection 17(1) of the National Defence Act authorize the organization of the Office of the Chief Military Judge as a unit of the Canadian Forces;

c) pursuant to subsection 17(2) of the National Defence Act direct that the Office of the Chief Military Judge be embodied in the Regular Force.

d) pursuant to article 1.13(4)(b) of the *Queen's Regulations and Orders for the Canadian Forces*, designate the officer appointed to be the Chief Military Judge as an officer having the power and jurisdiction of an officer commanding a command with respect to persons on the strength of the Office of the Chief Military Judge, subject to the limitation set out in article 4.091 of the Queen's Regulations and Orders for the Canadian Forces that the Chief Military Judge shall not exercise these powers with respect to any disciplinary matter and application for redress of grievance.

Je, soussigné, Arthur Eggleton, ministre de la Défense nationale, :

a) en vertu du paragraphe 17(1) de la Loi sur la défense nationale, annule tous les arrêtés ministériels précédents autorisant la constitution du Cabinet du juge militaire en chef;

b) en vertu du paragraphe 17(1) de la Loi sur la défense nationale, autorise la constitution du Cabinet du juge militaire en chef comme unité des Forces canadiennes;

c) en vertu du paragraphe 17(2) de la Loi sur la défense nationale, ordonne que le Cabinet du juge militaire en chef soit incorporé dans la force régulière.

d) en vertu de l'article 1.13(4) *b*) des *Ordonnances et règlements royaux applicables aux Forces canadiennes*, désigne l'officier qui remplit les fonctions de juge militaire en chef, à titre d'officier ayant la compétence et pouvant exercer les pouvoirs d'un officier commandant un commandement à l'égard des personnes faisant partie de l'effectif du Cabinet du juge militaire en chef, sous réserve de la restriction énoncée à l'article 4.091 des *Ordonnances et règlements royaux applicables aux Forces canadiennes,* selon laquelle le juge militaire en chef ne peut exercer ces pouvoirs en ce qui a trait à toute question disciplinaire et à toute demande de réparation d'une injustice.

Le ministre de la Défense nationale
Arthur Eggleton

Arthur Eggleton
Minister of National Defence

Given at Ottawa
This 7th day of February 2000

Fait à Ottawa
Ce 7e jour de février 2000

ANNEX D

Unclas C PROG 3763 271200Z FEB 08
FROM NDHQ C PROG OTTAWA//DDSM//
TO AIG 1702
CMJ OTTAWA//ZEN//
CFSU OTTAWA//COMPT//ZEN//
INFO NDHQ JAG OTTAWA//ZEN//
SIC CNA
BILINGUAL MESSAGE/MESSAGE BILINGUE
SUBJ: CANADIAN FORCES ORGANIZATION ORDER 3763 - OFFICE OF THE CHIEF MILITARY JUDGE (OFFICE
OF THE CMJ)
1. THIS ORDER, EFFECTIVE ON THE DATE OF ISSUE, SUPERSEDES CANADIAN FORCES ORGANIZATION
ORDER 3763 DATED 20 FEB 02
INTENTION
2. THIS IS AN ORGANIZATIONAL DOCUMENT AND IS NOT INTENDED FOR USE AS AN AUTHORITY FOR
OTHER THAN ORGANIZATIONAL PURPOSES
EXECUTION
3. IN ACCORDANCE WITH MINISTERIAL ORGANIZATION ORDER 2000007, THE MINISTER OF NATIONAL
DEFENCE HAS AUTHORIZED THE ORGANIZATION OF THE OFFICE OF THE CMJ, DEPT ID 3763, AS A UNIT
OF THE CANADIAN FORCES EMBODIED IN THE REGULAR FORCE.
ROLE
4. THE ROLE OF THE OFFICE OF THE CMJ IS TO:
A. APPOINT MILITARY TRIAL JUDGES TO PRESIDE AS PRESIDENTS OR PRESIDING JUDGES AT STANDING
COURTS MARTIAL AND SPECIAL GENERAL COURTS MARTIAL;
B. APPOINT MILITARY TRIAL JUDGES TO OFFICIATE AS JUDGE ADVOCATES AT DISCIPLINARY AND
GENERAL COURTS MARTIAL;
C. APPOINT PRESIDENTS AND MEMBERS OF DISCIPLINARY AND GENERAL COURTS MARTIAL; AND
D. PROVIDE COURT REPORTING SERVICES AND TRANSCRIPTS OF THE PROCEEDINGS OF COURTS MARTIAL
COMMAND AND CONTROL
5. THE OFFICER WHO HOLDS THE APPOINTMENT OF CMJ IS THE COMMANDING OFFICER OF THE OFFICE OF
THE CMJ. THE COMMANDING OFFICER OF THE OFFICE OF THE CMJ IS DESIGNATED AS AN OFFICER
HAVING THE POWER AND JURISDICTION OF AN OFFICER COMMANDING A COMMAND WITH RESPECT TO
PERSONNEL ON THE STRENGTH OF THE OFFICE OF THE CMJ, EXCEPT IN RESPECT OF APPLICATIONS FOR
REDRESS OF GRIEVANCE AND ANY DISCIPLINARY MATTER
6. AFTER ADJUDICATION OF A GRIEVANCE BY THE COMMANDING OFFICER OF THE OFFICE OF THE CMJ IN
HIS CAPACITY AS A COMMANDING OFFICER, THE NEXT SENIOR AUTHORITY FOR THE GRIEVANCE IS THE
CDS
LINGUISTIC DESIGNATION
7. THE OFFICE OF THE CMJ IS DESIGNATED A BILINGUAL UNIT
DISCIPLINE
8. THE COMMANDING OFFICER OF THE OFFICE OF THE CMJ SHALL NOT EXERCISE THE POWERS OR

JURISDICTION OF A COMMANDING OFFICER OR OFFICER COMMANDING A COMMAND WITH RESPECT TO ANY
DISCIPLINARY MATTER
9. MILITARY PERSONNEL IN THE OFFICE OF THE CMJ ARE CONSIDERED TO BE ON STRENGTH AT NDHQ
AND WILL BE DISCIPLINED IAW CFSU (OTTAWA) CFOO
SPECIAL INSTRUCTIONS
10. THE OFFICE OF THE CMJ SHALL BE SUPPORTED BY THOSE ELEMENTS AS SHOWN IN THE HUMAN
RESOURCE MANAGEMENT SYSTEM AND HAS DETACHMENTS AS SHOWN IN THAT SYSTEM
11. THE COMMANDING OFFICER OF THE OFFICE OF THE CMJ IS AUTHORIZED TO COMMUNICATE DIRECTLY
WITH SUCH AUTHORITIES AS ARE REQUIRED IN ORDER TO FULFILL THE ROLE AND FUNCTIONS OF HIS
OFFICE. THE COMMANDING OFFICER IS AUTHORIZED TO COMMUNICATE DIRECTLY WITH SUPPORTING UNITS
ON MATTERS PERTAINING TO SUPPORT SERVICES
12. THIS ORDER IS ISSUED ON BEHALF OF THE CHIEF OF THE DEFENCE STAFF.
END OF ENGLISH TEXT/LE TEXTE FRANCAIS SUIT
OBJET: ORDONNANCE D ORGANISATION DES FORCES CANADIENNES 3763 - CABINET DU JUGE MILITAIRE
EN CHEF (CABINET DU JMC)
1. LA PRESENTE ORDONNANCE REMPLACE L ORDONNANCE D ORGANISATION DES FORCES CANADIENNES 3763
DU 20 FEV 02 ET ENTRE EN VIGUEUR LE JOUR DE SA PUBLICATION
BUT

2. LE BUT DE LA PRESENTE ORDONNANCE EST D ENONCER LE MODE D ORGANISATION DU CABINET DU
JMC. CE DOCUMENT NE DOIT SERVIR QU A DES FINS D ORGANISATION
APPLICATION
3. CONFORMEMENT A L ARRETE MINISTERIEL D ORGANISATION 2000007, LE MINISTRE DE LA DEFENSE
NATIONALE A AUTORISE LA CONSTITUTION DU CABINET DU JMC, ID SVC 3763, QUI EST ORGANISE
COMME UNE UNITE DES FORCES CANADIENNES INCORPORE DANS LA FORCE REGULIERE.
ROLE
4. LE ROLE DU CABINET DU JMC EST:
A. DE NOMMER LES JUGES MILITAIRES QUI PRESIDENT EN TANT QUE PRESIDENT OU JUGE PRESIDANT
LES COURS MARTIALES PERMANENTES ET LES COURS MARTIALES GENERALES SPECIALES;
B. DE NOMMER LES JUGES MILITAIRES QUI FONT FONCTION DE JUGE-AVOCAT DEVANT LES COURS
MARTIALES DISCIPLINAIRES ET GENERALES;
C. DE NOMMER LES PRESIDENTS ET LES MEMBRES DES COURS MARTIALES DISCIPLINAIRES ET
GENERALES;
D. DE FOURNIR DES SERVICES DE STENOGRAPHIE JUDICIAIRE ET LES TRANSCRIPTIONS DES
DELIBERATIONS DES COURS MARTIALES
COMMANDEMENT ET CONTROLE
5. L OFFICIER QUI EST NOMME JMC EST LE COMMANDANT DU CABINET DU JMC. LE COMMANDANT DU
CABINET DU JMC EST CONSIDERE COMME UN OFFICIER AYANT LE POUVOIR ET LA COMPETENCE D UN

COMMANDANT DE COMMANDEMENT EN CE QUI CONCERNE LE PERSONNEL FAISANT PARTIE DE L EFFECTIF DU
JMC, SAUF POUR CE QUI EST DES DEMANDES DE REGLEMENT DE GRIEFS ET DE TOUTE QUESTION
DISCIPLINAIRE
6. APRES L ARBITRAGE D UN GRIEF PAR LE COMMANDANT DU CABINET DU JMC EN SA QUALITE DE
COMMANDANT, L AUTORITE IMMEDIATEMENT SUPERIEURE A L EGARD DU GRIEF EST LE CEMD
DESIGNATION LINGUISTIQUE
7. LE CABINET DU JMC EST DESIGNE UNITE BILINGUE
DISCIPLINE
8. LE COMMANDANT DU CABINET DU JMC NE DOIT PAS EXERCER LES POUVOIRS NI LA COMPETENCE D UN
COMMANDANT OU D UN COMMANDANT DE COMMANDEMENT A L EGARD DE TOUTE QUESTION DISCIPLINAIRE
9. LE PERSONNEL MILITAIRE DANS LE CABINET DU CMJ EST CONSIDERE PARMI LES EFFECTIFS DU QGDN
ET SERA DISCIPLINE SELON L OOFC DE L USFC (OTTAWA)
INSTRUCTIONS SPECIALES
10. LE CABINET DU JMC EST SOUTENU PAR LES ELEMENTS INDIQUES DANS LE SYSTEME DE GESTION DES
RESSOURCES HUMAINES ET POSSEDE LES DETACHEMENTS ENUMERES PAR CE SYSTEME
11. LE COMMANDANT DU CABINET DU JMC EST AUTORISE A COMMUNIQUER DIRECTEMENT AVEC CES
AUTORITES, LE CAS ECHEANT, AFIN D EXERCER LE ROLE ET LES FONCTIONS DE SON BUREAU. LE
COMMANDANT EST AUTORISE A COMMUNIQUER DIRECTEMENT AVEC LES UNITES DE SOUTIEN EN CE QUI
CONCERNE LES SERVICES DE SOUTIEN
12. CETTE ORDONNANCE EST PROMULGUEE AU NOM DU CHEF D ETAT-MAJOR DE LA DEFENSE.
Distribution List
EA/ADM(POL),ADM(IM)/COMPT,EA/ADM(FIN CS),
EA/CMS,EA/CLS,EA/CAS,C RES CDTS,DLSS,DHRIM,
D AIR PPD,DLAW/ADMIN LAW,DGHS,DOL,
D MAR PERS,DIMEI 4-3-2,DHH,DTFM 2
Drafted by: PA ROSS, DDSM 2-4, 992-5821
Released by: RP TESTA, COL, DDSM, 992-0176

ANNEX E

Chief of the Defence Staff

Chef d'état-major de la Défense

National Defence Headquarters
Ottawa, Ontario
K1A 0K2

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

14 June 2019

Distribution List

CDS ORDER - DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO CERTAIN OFFICERS AND OTHER RANKS ON THE STRENGTH OF THE NATIONAL DEFENCE HEADQUARTERS

References (Ref): A. 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 January 2018
B. Order – Designation of commanding officer with respect to service members who are holding the rank of Lieutenant-Colonel or below and who are on the strength of the National Defence Headquarters, 28 February 1997

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

a. revoke the order cited at ref A, dated the 5th day of January, 2018;

Le 14 juin 2019

Liste de distribution

ORDRE DU CEMD - DÉSIGNATION DE COMMANDANTS À L'ÉGARD DE CERTAINS OFFICIERS ET GRADES INFÉRIEURS QUI FIGURENT À L'EFFECTIF DU QUARTIER GÉNÉRAL DE LA DÉFENSE NATIONALE

Références (Réf) : A. Ordre du CEMD - Désignation de commandants à l'égard de certains officiers qui figurent à l'effectif du Quartier général de la Défense nationale et des officiers du grade de lieutenant-général/vice-amiral, 5 janvier 2018
B. Ordre – Désignation de commandant à l'égard des militaires qui détiennent le grade de lieutenant-colonel ou un grade moins élevé et qui figurent à l'effectif du Quartier général de la Défense nationale, 28 février 1997

1. Je, soussigné, J.H. Vance, Chef d'état-major de la défense, en vertu de la définition de « commandant » qui figure à l'article 1.02 des *Ordonnances et règlements royaux applicables aux Forces canadiennes*:

a. abroge l'ordre à la réf A du 5 janvier 2018;

National Defence Défense nationale

Canada

ANNEX F

Regulations	**Règlements**
Power of Governor in Council to make regulations **12 (1)** The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.	**Gouverneur en conseil** **12 (1)** Le gouverneur en conseil peut prendre des règlements concernant l'organisation, l'instruction, la discipline, l'efficacité et la bonne administration des Forces canadiennes et, d'une façon générale, en vue de l'application de la présente loi.
Minister's power to make regulations **(2)** Subject to section 13 and any regulations made by the Governor in Council, the Minister may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.	**Ministre** **(2)** Sous réserve de l'article 13 et des règlements du gouverneur en conseil, le ministre peut prendre des règlements concernant l'organisation, l'instruction, la discipline, l'efficacité et la bonne administration des Forces canadiennes et, d'une façon générale, en vue de l'application de la présente loi.
Treasury Board's power to make regulations **(3)** The Treasury Board may make regulations **(a)** prescribing the rates and conditions of issue of pay of military judges, the Director of Military Prosecutions and the Director of Defence Counsel Services; **(b)** prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and **(c)** providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.	**Conseil du Trésor** **(3)** Le Conseil du Trésor peut, par règlement : **a)** fixer les taux et conditions de versement de la solde des juges militaires, du directeur des poursuites militaires et du directeur du service d'avocats de la défense; **b)** fixer, en ce qui concerne la solde et les indemnités des officiers et militaires du rang, les suppressions et retenues; **c)** prendre toute mesure concernant la rémunération ou l'indemnisation des officiers et militaires du rang qu'il juge nécessaire ou souhaitable de prendre par règlement pour l'application de la présente loi.
Retroactive effect **(4)** Regulations made under paragraph (3)(a) may, if they so provide, have retroactive effect. However, regulations that prescribe the rates and conditions of issue of pay of military judges may not have effect **(a)** in the case of an inquiry under section 165.34, before the day referred to in subsection 165.34(3) on which the inquiry that leads to the making of the regulations is to commence; or	**Rétroactivité** **(4)** Tout règlement pris en vertu de l'alinéa (3)a) peut avoir un effet rétroactif s'il comporte une disposition en ce sens; il ne peut toutefois, dans le cas des juges militaires, avoir d'effet : o **a)** dans le cas de l'examen prévu à l'article 165.34, avant la date prévue au paragraphe 165.34(3) pour le commencement des travaux qui donnent lieu à la prise du règlement;

(b) in the case of an inquiry under section 165.35, before the day on which the inquiry that leads to the making of the regulations commences.	o **b)** dans le cas de l'examen prévu à l'article 165.35, avant la date du début de l'examen qui donne lieu à la prise du règlement.
Units and Other Elements **Organization** **17 (1)** The Canadian Forces shall consist of those of the following elements that are from time to time organized by or under the authority of the Minister: **(a)** commands, including the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force; **(b)** formations; **(c)** units; and **(d)** other elements. **Components** **(2)** A unit or other element organized under subsection (1), other than a command or a formation, shall from time to time be embodied in a component of the Canadian Forces as directed by or under the authority of the Minister.	**Unités et autres éléments** **Constitution** **17 (1)** Les Forces canadiennes sont formées des commandements — notamment la Marine royale canadienne, l'Armée canadienne et l'Aviation royale canadienne — formations, unités et autres éléments constitués par le ministre ou sous son autorité. **Éléments constitutifs** **(2)** L'incorporation d'une unité ou d'un autre élément — autre qu'un commandement ou une formation — constitué aux termes du paragraphe (1) dans un élément constitutif donné des Forces canadiennes se fait sur instruction du ministre ou sous son autorité.
Chief of the Defence Staff **Appointment, rank and duties of Chief of Defence Staff** **18 (1)** The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces. **Responsibility and channels of communication** **(2)** Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the	Chef d'état-major de la défense Fonctions du chef d'état-major de la défense **18 (1)** Le gouverneur en conseil peut élever au poste de chef d'état-major de la défense un officier dont il fixe le grade. Sous l'autorité du ministre et sous réserve des règlements, cet officier assure la direction et la gestion des Forces canadiennes. Voie hiérarchique pour les ordres et directives **(2)** Sauf ordre contraire du gouverneur en conseil, tous les ordres et directives adressés aux Forces canadiennes pour donner effet aux décisions et instructions du gouvernement fédéral ou du ministre émanent, directement ou indirectement, du chef d'état-major de la défense.

Minister shall be issued by or through the Chief of the Defence Staff.	
Persons subject to Code of Service Discipline **60 (1)** The following persons are subject to the Code of Service Discipline: **(a)** an officer or non-commissioned member of the regular force; **(b)** an officer or non-commissioned member of the special force; **(c)** an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is **(i)** undergoing drill or training, whether in uniform or not, **(ii)** in uniform, **(iii)** on duty, **(iv)** [Repealed, 1998, c. 35, s. 19] **(v)** called out under Part VI in aid of the civil power, **(vi)** called out on service, **(vii)** placed on active service, **(viii)** in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence, **(ix)** serving with any unit or other element of the regular force or the special force, or **(x)** present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces; **(d)** subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, is attached or seconded as an officer or	Personnes assujetties au code de discipline militaire **60 (1)** Sont seuls justiciables du code de discipline militaire : **a)** les officiers ou militaires du rang de la force régulière; **b)** les officiers ou militaires du rang de la force spéciale; **c)** les officiers ou militaires du rang de la force de réserve se trouvant dans l'une ou l'autre des situations suivantes : **(i)** en période d'exercice ou d'instruction, qu'ils soient en uniforme ou non, **(ii)** en uniforme, **(iii)** de service, **(iv)** [Abrogé, 1998, ch. 35, art. 19] **(v)** appelés, dans le cadre de la partie VI, pour prêter main-forte au pouvoir civil, **(vi)** appelés en service, **(vii)** en service actif, **(viii)** à bord d'un navire, véhicule ou aéronef des Forces canadiennes ou dans — ou sur — tout établissement de défense ou ouvrage pour la défense, **(ix)** en service dans une unité ou un autre élément de la force régulière ou de la force spéciale, **(x)** présents, en uniforme ou non, à l'exercice ou l'instruction d'une unité ou d'un autre élément des Forces canadiennes; **d)** sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes qui, d'après la loi ou un accord entre le Canada et l'État dans

non-commissioned member to the Canadian Forces;

(e) a person, not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces;

(f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;

(g) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;

(h) an alleged spy for the enemy;

(i) a person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody; and

(j) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to that Code.

Continuing liability

(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

Retention of status and rank

(3) Every person who, since allegedly committing a service offence, has ceased to be a person described in subsection (1), shall for the purposes of the Code of Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt

les forces armées duquel elles servent, sont affectées comme officiers ou militaires du rang aux Forces canadiennes ou détachées auprès de celles-ci;

e) les personnes qui, normalement non assujetties au code de discipline militaire, servent comme officiers ou militaires du rang dans toute force levée et entretenue à l'étranger par Sa Majesté du chef du Canada et commandée par un officier des Forces canadiennes;

f) les personnes qui, normalement non assujetties au code de discipline militaire, accompagnent quelque unité ou autre élément des Forces canadiennes en service, actif ou non, dans un lieu quelconque;

g) sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes fréquentant un établissement créé aux termes de l'article 47;

h) les présumés espions pour le compte de l'ennemi;

i) les personnes qui, normalement non assujetties au code de discipline militaire, sont sous garde civile ou militaire pour quelque infraction d'ordre militaire qu'elles ont — ou auraient — commise;

j) les personnes qui, normalement non assujetties au code de discipline militaire, servent auprès des Forces canadiennes aux termes d'un engagement passé avec le ministre par lequel elles consentent à relever de ce code.

Maintien du statut de justiciable

(2) Quiconque était justiciable du code de discipline militaire au moment où il aurait commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé pour cette infraction sous le régime du code de discipline militaire, même s'il a cessé, depuis que l'infraction a été commise, d'appartenir à l'une des catégories énumérées au paragraphe (1).

Rétention des statut et grade

(3) Quiconque a cessé, depuis la présumée perpétration d'une infraction d'ordre militaire,

with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).	d'appartenir à l'une des catégories énumérées au paragraphe (1) est réputé, pour l'application du code de discipline militaire, avoir le statut et le grade qu'il détenait immédiatement avant de ne plus en relever, et ce tant qu'il peut, aux termes de ce code, être accusé, poursuivi et jugé.