HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. Christmas*, 2020 CM 3009

Date: 20201110
Docket: 202011

Preliminary Proceedings

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Corporal K.L. Christmas, Applicant

- and -

Her Majesty the Queen, Respondent

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

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

(Orally)

Introduction

[1] Corporal Christmas is charged with one offence punishable under section 130 of the *National Defence Act* (*NDA*) for sexual assault contrary to section 271 of the *Criminal Code*, with one offence punishable under section 93 of the *National Defence Act* for having behaved in a disgraceful manner for having touched the genitals of a person without his consent; and with one offence punishable under section 9 of the *National Defence Act* for drunkenness.

[2] The alleged offences would have occurred at the Truro Armouries in Truro, Nova Scotia, on or about 17 March 2019.

[3] Some charges were initially laid against Corporal Christmas by way of a Record of Disciplinary Proceedings on 25 June 2019.

[4] The charge sheet was signed by a representative of the Director of Military Prosecutions (DMP) on 21 February 2020 and preferred by the DMP on 2 March 2020.

[5] As no coordination teleconference was held to determine trial dates for files such as the one for Corporal Christmas between mid-March and the end of June 2020 due to the health emergency caused in Canada by COVID-19, it is only when coordination teleconferences resumed on 25 June 2020 that the parties were able to agree on 16 November 2020 as the date for the Court Martial Administrator (CMA) to convene the court martial.

[6] Consequently, on 16 July 2020, the CMA convened a General Court Martial (GCM) for Corporal Christmas to commence on 16 November 2020. However, further to a new choice, as of right, made by the accused on 12 August 2020 regarding the type of court martial, the CMA reconvened a Standing Court Martial (SCM) to reflect this decision.

[7] On 13 August 2020, the CMA convened this matter to be held by way of an SCM in Sydney, Nova Scotia, on 16 November 2020.

[8] On 31 August 2020, Corporal Christmas's defence counsel filed a notice of application pursuant to section 187 of the *NDA* with the Office of the Chief Military Judge (Office of the CMJ) for a question to be heard by the military judge assigned to preside at the court martial before the commencement of the trial.

[9] With the agreement of the parties, the hearing of this application as a preliminary proceedings was set to take place on 26 October 2020 at the Asticou courtroom, in Gatineau, province of Quebec.

[10] In her written notice of application, the applicant was claiming that the order of the Chief of the Defence Staff (CDS) issued on 2 October 2019 regarding the designation of the officer appointed to the position of Deputy Vice Chief of the Defence Staff (DVCDS) as to exercising 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 CMJ was a violation of her right to a hearing by an independent and impartial tribunal, in accordance with paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

[11] However, on 15 September 2020, the CDS suspended the 2 October 2019 order pending a final determination by the Court Martial Appeal Court (CMAC) in various appeals made before that Court on the same issue raised before me by Corporal Christmas.

[12] Consequently, after re-examining the situation, Corporal Christmas's defence counsel withdrew the notice of application and filed a new one with the Office of the CMJ on 13 October 2020. It was agreed by both parties that the date agreed on for hearing the previous preliminary application would remain the same for the new application filed, which is 26 October 2020.

[13] The applicant is now claiming that despite the suspension of the CDS Order dated 2 October 2019, the latter has still maintained, through the existence of some other orders he made, a legal structure providing a commanding officer to service members on the strength of the National Defence Headquarters (NDHQ), which would include military personnel belonging to the Office of the CMJ. Thereby, Canadian Armed Forces (CAF) officers holding the office of military judge would then remain subordinated to the authority of a commanding officer for being disciplined while performing their function as a military judge, despite the suspension of the CDS Order dated 2 October 2019. As a result, Corporal Christmas suggested that such situation would constitute a violation of her right to a hearing by an independent and impartial tribunal, in accordance with paragraph 11(*d*) of the *Charter*.

[14] As a remedy, she asked me to order a stay of the proceedings, pursuant to subsection 24(1) of the *Charter*.

The evidence

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

The context

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

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

[18] On 1 September 1999, under section 102 of Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts* (S.C. 1998, c. 35), the officers who had been appointed by the Minister of National Defense for holding the office of Chief Military Trial Judge and of military trial judge were then appointed, by the operation of that Act, by the Governor in Council under subsection

165.21(1) of the *NDA* for respectively holding the office of CMJ and of military judge. As a consequence, the CMJ and these military judges at the time, and any other officer appointed for holding the office of CMJ and military judge by the Governor in Council thereafter, automatically became part of the Office of the CMJ.

[19] On 7 February 2000, the MND issued a new MOO for the Office of the CMJ in order to reflect the content of article 4.091 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), which specified that the CMJ shall not exercise powers with respect to any disciplinary matter. Nothing else was modified.

[20] Pursuant to CFOO 3763, the Office of the CMJ is a unit considered as being on the strength of the NDHQ in Ottawa.

[21] The CDS has issued various orders in the past which designate a specific position within NDHQ as a commanding officer with respect to service members who are on the strength of the NDHQ. These orders aim at two groups: officers with three subgroups (major-general/rear-admiral or above; colonel and brigadier-general/captain and commodore; lieutenant-colonel/commander or below), and non-commissioned members as the second group (private/ordinary seaman to chief warrant officer/chief petty officer, 1st class).

[22] On 19 January 2018, the CDS issued a specific order for the designation of commanding officers with respect to officers and non-commissioned members on the strength of the Office of the CMJ. In this order, the officer appointed to the position of Chief of Programme was designated to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the CMJ, and the officer appointed to the position of Commandant of the Canadian Forces Support Unit (Ottawa) would do the same towards officers other than a military judge and non-commissioned members on the strength of the Office of the CMJ.

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

[24] Thereby, the DVCDS, who is a brigadier-general/commodore, became the commanding officer of the military judges with respect to any disciplinary matter regarding them.

[25] Then, the situation developed as summarized by Pelletier M.J. in his decision *R.* v. *Iredale*, 2020 CM 4011, at paragraphs 8 to 17:

> [8] Shortly thereafter and roughly at the same time, two similar applications were received by the court administration in the cases of Master-Corporal Pett and Corporal D'Amico, alleging that the CDS giving disciplinary power over military judges to the executive impugns judicial independence in a manner which cannot be sufficiently

remedied by the institutional background of the military judiciary, thereby violating accused's right to be tried before an impartial and independent tribunal as guaranteed at paragraph 11(d) of the *Canadian Charter of Rights and Freedoms (Charter)*.

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

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

[11] As noted at paragraphs 66 to 71 of *D'Amico*, the role of the Military Judges Inquiry Committee and its interaction with the disciplinary regime applicable to officers had a practical application as it pertains to the then on-going prosecution of the Chief Military Judge, Colonel Dutil, before a court martial. The military judge presiding that trial, d'Auteuil M.J., granted an application by the defence to recuse himself (*R. c. Dutil*, 2019 CM 3003) and, in his capacity as judge delegated with the authority to appoint judges to preside courts martial, refused to appoint any other judge to preside over the trial. At the time the *Pett* and *D'Amico* decisions were rendered, Martineau J. of the Federal Court was deliberating on an application by the DMP for judicial review of the decision by d'Auteuil M.J. not to appoint another military judge to preside the Dutil trial, thereby placing the prosecution of the Chief Military Judge at a dead end. In a comprehensive decision which referred extensively to *Pett* and *D'Amico*, Martineau J. dismissed the application of the DMP for judicial review on 3 March 2020 in *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330. A week later, on 11 March 2020, the DMP announced in a press release that he was withdrawing the charges against Colonel Dutil in consideration, amongst other factors, of the Federal Court decision.

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

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

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

[15] The arguments heard in the Leading Seaman Edwards and Captain Crépeau matters generated two decisions, both rendered on 14 August 2020 and published as *R. v. Edwards*, 2020 CM 3006 and *R c. Crépeau*, 2020 CM 3007. My colleague d'Auteuil M.J. granted both applications in part and ordered a stay of proceedings undertaken against both accused. The only distinction between these two cases is how the applicants characterized their demands as it pertains to the required findings relating to the constitutional validity of the disciplinary regime set out in the *NDA* as it applies to military judges. In *Edwards*, the applicant demanded that this regime be declared of no force or effect, while in *Crépeau*, as in this case, the applicant requested a declaration of constitutional invalidity of sections 12, 18 and 60 of the *NDA*, in addition to demanding as a subsidiary remedy, a declaration of invalidity of the impugned CDS order. In both cases, the decision was to refuse to grant declarations of unconstitutionality of the regime or specific sections of the *NDA* impugned while declaring that the accused's right under paragraph 11(d) of the *Charter* to a hearing before an independent and impartial tribunal had been violated.

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

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

[26] In *Iredale*, Pelletier M.J. rendered his decision on 11 September 2020 and delivered the written reasons on 17 September 2020. He declared that the right of Captain Iredale under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal had been infringed that the CDS order dated 2 October 2019 to be of no force or effect as it pertains to paragraphs 1(b) and 2, applicable to any disciplinary matter involving a military judge, and directed, pursuant to subsection 24(1) of the *Charter*, that the proceedings of the GCM in respect of Captain Iredale be stayed.

[27] On 15 September 2020, the CDS suspended the order he made on 2 October 2019. Despite that only two paragraphs of the CDS Order were declared by courts martial to be of no force or effect, the CDS made the decision to suspend his order in its entirety.

[28] It is further to this decision made by the CDS to suspend this order that counsel for the applicant decided to review the entire issue. As a consequence, they filed the current application as a substitute for the previous one.

[29] On 7 and 8 October 2020, Sukstorf M.J. heard an application in the matter of *R.* v. *MacPherson and Chauhan and J.L.*, 2020 CM 2012. She had to consider three issues related to the right of an accused to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter*, despite the fact that the CDS suspended his 2 October 2019 order. She dismissed the application on 14 October 2020 and delivered her reasons on 23 October 2020. Essentially, she concluded:

> (a) that the Office of the CMJ, to which military judges belong, does not lack administrative independence from the CAF, and as such, there is no infringement of the accused's right to an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*;
>
> (b) that the military judges, who belong to the Office of the CMJ, a unit of the CAF, do not lack institutional independence, thus there is no infringement of the accused's right to an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*; and
>
> (c) that sections 12, 17, 18 and 60 of the *NDA* do not violate paragraph 11(*d*) of the *Charter*.

[30] It must be noted that the question to be decided by this Court is similar to the second issue listed above and for which Sukstorf M.J. made a ruling in *MacPherson and Chauhan and J.L.*

[31] As of today, in accordance with all existing CDS Orders, and more specifically the one dated 14 June 2019, the officer appointed to the position of commanding officer CFB Ottawa-Gatineau and holding the rank not below Lieutenant-Colonel/Commander is the commanding officer with respect to all service members of the rank of

Lieutenant-Colonel and below on the strength of NDHQ. The officer appointed to the position of DVCDS and holding the rank not below major-general is the commanding officer with respect to any officer of the rank of brigadier-general and colonel.

[32] As a matter of context, all military judges are actually wearing the rank of lieutenant-colonel/commander and all military clerk-court reporters are of the rank of master warrant officer/chief petty officer 2nd class and warrant officer/petty officer 1st class. Both military judges and military clerk-court reporters are on the strength of the Office of the CMJ.

[33] As specified at subsection 165.24(2) of the *NDA*, the CMJ holds a rank that is not less than colonel/captain. However, there is actually no CMJ who has been appointed by an Order in Council since the retirement of Colonel Dutil as the CMJ on 20 March 2020 because he attained retirement age as specifically mentioned in the *NDA*. It is a function that he performed for almost 14 years. As the Deputy Chief Military Judge appointed by an Order in Council on 14 June 2018, in accordance with section 165.29 of the *NDA*, I exercise and perform the powers, duties and functions of the CMJ since Colonel Dutil retired.

Positions of the parties

The applicant

[34] The applicant's position is that CFOO 3763, objectively viewed, makes CAF officers holding the office of military judge subordinated to the authority of a commanding officer, making them subject to the regime in the CSD dealing with a service offence, which would lead the well-informed observer to the conclusion that military judges are not sufficiently independent of the executive to fulfil the requirements of a hearing by an independent and impartial tribunal as laid out in paragraph 11(*d*) of the *Charter*.

[35] Corporal Christmas also suggested that the preamble of the CDS Order dated 15 September 2020, to the effect of suspending the CDS Order dated 2 October 2019, is an additional indication of intent from the executive branch to maintain such subordination for any CAF officer holding the office of military judge.

[36] This CFOO 3763 for the Office of the CMJ purports to place the commanding officer CFB Ottawa-Gatineau and holding the rank not below lieutenant-colonel/captain in a position of commanding officer with respect to any disciplinary matter involving any CAF officer holding the office of military judge. The impact would be the same for the military judge appointed CMJ by an Order in Council, to the difference that it is the DVCDS that would be in a position of a commanding officer.

[37] According to the applicant, the principle of institutional independence requires that military judges be free from external pressure, and even the mere threat of disciplinary consequence by executive authorities without duly considering first the

Military Judges Inquiry Committee, the mechanism provided for in the CSD to address allegations of misconduct involving military judges for avoiding to interfere not only with the judicial function itself, but the military judge's ability to exercise it at all.

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

[39] As a matter of remedies, the applicant requests an order pursuant to subsection 24(1) of the *Charter*, that the court martial proceedings against her be stayed due to the breach of her right to be tried by an independent and impartial tribunal as guaranteed by paragraph 11(*d*) of the *Charter*.

The respondent

[40] The respondent's position is that the designation of a commanding officer for CAF officers holding the office of military judge, making them subject to the regime in the CSD dealing with a service offence, does not threaten the independence of military judges, despite the fact that it is not directly expressed anywhere, especially considering the interpretation of some recent courts martial decisions, which indicate that due consideration must be given first to the Military Judges Inquiry Committee to address any allegations of misconduct involving military judges under the CSD.

[41] In addition, as my colleague Sukstorf M.J. decided on a very similar issue after the CDS suspended his order dated 2 October 2019, the principle of judicial comity should be applied in order to promote certainty and consistency in the law and, accordingly, I should dismiss the present application, considering that she did the same. In other words, the prosecution suggested that the decision in *MacPherson and Chauhan and J.L* is a binding precedent and that the application before this Court shall be dealt with in the exact same way, which is to conclude that there are sufficient guarantees of judicial independence to allow military judges to be perceived as independent and impartial, despite that the CSD's regime dealing with a service offence continues to capture military judges in their role as officers, and to dismiss the application.

[42] Even if the Court was to find the legal structure has been maintained by the CDS for providing a commanding officer to CAF officers holding the office of military judge, making them subject to the regime in the CSD dealing with a service offence, infringes on paragraph 11(*d*) of the *Charter*, the respondent claims that the remedy requested by the applicant is the wrong one. At most, this court martial could declare such legal structure to be legally inapplicable to military judges in the context of this trial and move on with it, especially considering that this issue is a new one and different from the one related to the CDS Order dated 2 October 2019.

[43] Finally, according to the respondent, a stay pursuant to subsection 24(1) of the *Charter* is not appropriate. If the tribunal is not independent, such declaration does not

justify a stay. If there is an infringement that cannot be remedied, then the alternative solution is to terminate the proceedings.

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

Analysis

Judicial independence

[45] Paragraph 11(*d*) of the *Charter* reads as follows:

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

[46] As I said in my decisions of *Edwards* and *Crépeau*, the purpose of paragraph 11(*d*) of the *Charter* is to guarantee that the process whereby the guilt of any accused will be proven is fair. An essential component of a fair process is that the trier of fact, in this case the military judge as it is a SCM, be independent and impartial.

[47] As I said in *Edwards* and *Crépeau*, the three core characteristics of judicial independence, as identified by case law, are security of tenure, financial security and administrative independence. I also mentioned in the same decisions that, always based on case law, the guarantee of judicial independence is for the benefit of the judged, not the judges.

[48] In *R.* v. *Généreux*, [1992] 1 S.C.R. 259, Lamer C.J. summarized at page 278-279 the dissenting reasons of Décary J. expressed in the context of the decision delivered by the Court Martial Appeal Court on this matter:

> Décary J. concluded that the General Court Martial failed to meet the standard required by s. 11 (*d*) of the *Charter*. Given the strong institutional links between the General Court Martial and the Ministry of Defence, there was a reasonable apprehension that the tribunal was subject to the influence and control of the executive. In brief, he believed that "there is such institutional connivance and vulnerability between the Canadian Forces and the General Court Martial that the latter's independence within the meaning of the Charter is seriously compromised" (p. 374). The Department of National Defence, as prosecutor, is in a position to exert pressure on or control the charge, investigation, custody, decision to proceed, convening of the tribunal, composition of the tribunal and officers of the tribunal. Specifically, Décary J. thought it was unacceptable that the Minister, or a member of the Canadian Forces, had authority to decide who shall sit in a particular case. The situation was aggravated by the fact that military judges do not belong to an independent judiciary, but are in the service of the military during the trial and return directly to the service following the conclusion of the trial. Décary J. declined

> to consider, given the paucity of evidence, whether the existing court-martial system was justified under s. 1 of the *Charter*.
>
> Décary J. concluded that although the *Charter* permits the existence of a separate system of military law and military tribunals, the distinct system must nonetheless comply with s. 11(*d*). An individual who is charged with a breach of the Code of Service Discipline has the right to be tried by a military tribunal that is independent and impartial.

[49] It is interesting to note that the Supreme Court of Canada majority decision in *Généreux* supported the reasons and conclusion of Décary J.

CMAC decisions on judicial independence

[50] The issue of judicial independence for courts martial as a question about the right of an accused to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter* is not new. At the beginning of the nineties, some CMAC decisions, such as *R. v Ingebrigtson*, 1990 CanLII 8107 (CMAC), *R. v Deschênes* (1991), 5 C.M.A.R. 110 and *R. v. Roy*, CMAC-319 delivered on 13 March 1991, concluded that a SCM was not an independent tribunal within the contemplation of paragraph 11(*d*) of the *Charter* because of inadequate security of tenure and financial security.

[51] It must be noted that the Supreme Court of Canada decision in *Généreux* concluded in the same way, but about a GCM.

[52] Further to changes made to the *NDA* and the QR&O, this issue was discussed again in the CMAC decision of *R. v. Edwards*, [1995] C.M.A.J. No. 10. In that decision, the Court concluded that the judge advocate appointed and holding office for a fixed term going from two to four years pursuant to this regime did have sufficient security of tenure to meet the requirements of an independent tribunal prescribed by paragraph 11(*d*) of the *Charter*.

[53] Three years later, the same Court in its decision of *R. v. Lauzon*, CMAC-415, issued on 18 September 1998, concluded that the renewal process for the appointment of an officer to a military trial judge's position was lacking because this reappointment process was not accompanied by substantial and sufficient guarantees to ensure that the Court and the military trial judge in question were free from pressure on the part of the executive that could influence the outcome of future decisions.

[54] In addition, the Court concluded that an informed person can reasonably conclude that the office of military trial judge is not free from discretionary or arbitrary intervention by the Executive or by the authority responsible for appointments, because the Minister of National Defence was controlling the process of removing military trial judges and the chief military trial judge. It must be noted that, at the time, the majority of the Inquiry Committee for military trial judges was composed of members of the executive and its chairman was the JAG.

[55] Consequently, the Court in *Lauzon* concluded that the SCM was not an independent tribunal within the meaning of paragraph 11(*d*) of the *Charter* and the *NDA* and QR&O provisions concerning the process of appointing the members of the SCM were declared to be invalid and of no force and effect.

[56] In its decision of *R. v. Bergeron*, CMAC-417, issued on 15 February 1999, the CMAC reaffirmed the decision delivered in *Lauzon*.

[57] On 1 September 1999, pursuant to important amendments made under Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts* (S.C. 1998, c. 35), Parliament made the decision to establish a truly independent military judiciary.

[58] Some key elements of these changes were, among other things, the appointment by the Governor in Council of officers to be military judges, and a Military Judges Inquiry Committee composed exclusively of CMAC judges, who are also federally appointed judges belonging to many different courts throughout the country.

[59] Security of tenure for military judges presiding at a court martial has been again raised as a constitutional issue before the CMAC in the case of *R. v. Leblanc*, 2011 CMAC 2. In that decision delivered in June 2011, five-year renewable terms for military judges were considered as not providing them with a sufficient constitutional guarantee of security of tenure, and consequently, the Court declared invalid and of no force or effect the *NDA* and QR&O provisions concerning the reappointment of military judges. In addition, it suspended this declaration of invalidity to allow Parliament to make the necessary legislative corrections.

[60] The *Security of Tenure of Military Judges Act*, S.C. 2011, c. 22 assented to the month of November 2011 made the necessary legislative corrections with provisions stating that a military judge holds office until retirement age, which is 60 years old, or until being released on his or her request, or if being removed by the Governor in Council for cause on the recommendation of the Military Judges Inquiry Committee. In short, Parliament decided to get rid of the reappointment process by appointing military judges until retirement age.

The Military Judges Inquiry Committee

[61] This historical contextual background of CMAC decisions about the judicial independence of the military judges and the court martial in the context of an analysis of the right of an accused to a hearing before an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter* strongly supports the analysis and conclusion made by my colleague Pelletier M.J. in *Pett* concerning the importance of the Military Judges Inquiry Committee, and more specifically his remarks at paragraphs 89 to 104. At paragraph 104, he concluded on this issue as follows :

> [F]rom a legislative and regulatory perspective, the structure applicable to the discipline of military judges meets the requirement of judicial impartiality, as long as the significant

> safeguard provided by the Military Judges Inquiry Committee is allowed to operate efficiently. This safeguard ensures that military judges are immune from any disciplinary or administrative measures initiated by the executive and prevents any reasonable apprehension of bias from forming in the mind of a reasonable, well-informed person looking at the structure governing the military judiciary and the courts martial system.

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

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

[64] Consequently, any CAF officer holding the office of military judge shall see his or her conduct reviewed only by the Military Judges Inquiry Committee, as long as he or she holds his or her office.

[65] As said by my colleagues Pelletier and Sukstorf M. JJ. respectively in *Pett* and *D'Amico*, the Military Judges Inquiry Committee set by the CSD does exempt officers from being dealt with the regime in the CSD dealing with a service offence while they are military judges.

[66] Such interpretation of the provisions regarding the Military Judges Inquiry Committee shall be made because it reflects the Parliament's intention to legally deconflict the roles and status of military judges as both judicial and executive officers by having the CAF officer holding the office of military judge, once appointed, transferred from the executive to the judicial branch of government and have his or her conduct reviewed accordingly, meaning that a military judge cannot be charged for a service offence as an officer under the CSD while he or she is performing the office of military judge.

The alleged violation

[67] As I stated in *Edwards* and *Crépeau*, the regime in the CSD dealing with a service offence is administered primarily by the chain of command. As a matter related to a service offence is initially decided to be dealt with by a hierarchal authority superior in rank to the one held by any CAF officer holding the office of military judge, which would include the CMJ, then essentially, it would mean that a person in authority

from the executive is put in a position to potentially exercise some form of coercion against an CAF officer holding the office of military judge for a disciplinary matter. Then, such situation does not make a military judge free as possible from the interference of the members of the military hierarchy in the eyes of a well-informed observer.

[68] For me, it does not make any difference if such legal structure is put in place by specifically targeting military judges or simply referring to CAF officers holding the office of military judge. In both cases, factually speaking, the result is the same: the executive is aiming at trying to regulate the conduct of the military judiciary by using the regime in the CSD dealing with a service offence, while it shall be done through the Military Judges Inquiry Committee.

[69] Allowing the regime in the CSD dealing with a service offence regulating the conduct of CAF officers holding the office of military judge 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.

[70] In the light of my conclusion that the enactment of the provisions on the Military Judges Inquiry Committee by Parliament has had the effect of proscribing the application of the regime in the CSD dealing with a service offence towards military judges, I shall now turn to the context raised and supporting the presentation of Corporal Christmas's application.

[71] Paragraph 9 of CFOO 3763 reads as follows:

> "Military personnel in the office of the CMJ are considered to be on strength at NDHQ and will be disciplined IAW CFSU (Ottawa) CFOO"

[72] I agree that paragraph 9 of CFOO 3763 makes CAF officers holding the office of military judge subordinated to the authority of a commanding officer for making them subject to the regime in the CSD dealing with a service offence with respect to any disciplinary matter involving a military judge. This document relied on the legal structure put in place for all officers and non-commissioned members on the strength of the NDHQ. The effect of paragraph 9 of CFOO 3763 is to allow the application of this legal structure to CAF officers holding the office of military judge, which includes the application of the regime in the CSD dealing with a service offence to them. In essence, the situation is not different than the one considered in some recent decisions delivered by courts martial since the beginning of 2020 concerning the CDS Order dated 2 October 2019.

[73] The practical effect of such situation is that the CDS, through CFOO 3763 issued on his behalf, makes possible the use of the regime in the CSD dealing with a service offence towards CAF officers holding the office of military judge, while the

legislator has clearly established a judicial complaints mechanism in the CSD as the primary means to address their misconduct.

[74] As a result, I conclude that a reasonable and informed observer, being aware of the context I have just described, viewing the matter realistically and practically would conclude that CAF officers holding the office of military judge and presiding at a court martial are not free from pressure by the executive. In addition, it raises concerns as to the confidence of the public and the persons subject to the CSD may have regarding the independence of the military judiciary.

[75] The mention by the CDS of CFOO 3763 in his order dated 15 September 2020 concerning the suspension of the CDS Order dated 2 October 2019, the latter considered by courts martial as extending specifically to the military judges the regime in the CSD dealing with a service offence, does not help to conclude differently. To the contrary, by virtue of reiterating the existence of CFOO 3763 contributes to maintaining in the eyes of a reasonable and well informed observer, the impression that the regime in the CSD dealing with a service offence towards officers still applies to military judges, no matter what the real intent of the CDS as a signing authority may be.

[76] I conclude that paragraph 9 of CFOO 3763, as it applies to CAF officers holding the office of military judge, violates judicial independence and constitutes an infringement to the right of Corporal Christmas to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter*.

The principle of judicial comity

[77] In reaching this conclusion, I am fully aware that my conclusion on this legal issue is different from the one made by my colleague Sukstorf M.J. in *MacPherson and Chauhan and J.L.*, while she was dealing with the same context as the one presented to me during the hearing of this application.

[78] I agree with Pelletier M.J. when he said in *R. v. Caicedo*, 2015 CM 4018, at paragraph 20, that the principle of judicial comity should be applied between military judges presiding different courts martial in order to promote certainty and consistency in the law. However, it is also recognized that judicial comity is not to be applied absolutely.

[79] In *Crépeau*, for which reasons were delivered some days after *Edwards*, I specified that the enactment by Parliament of the provisions of the *NDA* respecting the Military Judges Inquiry Committee had the effect of prohibiting the application of the CSD's regime dealing with a service offence to military judges. I took the exact same approach for deciding the very same issue in *Fontaine*. Obviously, since I had to address this issue for the first time in *Edwards*, my perspective has never changed.

[80] In *Iredale*, Pelletier M.J. saw no reason to depart from the findings he first made in *Pett* about the existence of a violation of the right of the accused before a court

martial under paragraph 11(*d*) of the *Charter*. It can be said that I made the same conclusion in *Edwards*, *Crépeau* and *Fontaine*.

[81] Sukstorf M. J. said in *MacPherson and Chauhan and J.L.* that there are sufficient guarantees of judicial independence to allow military judges to be perceived as independent and impartial, despite that the CSD's regime dealing with a service offence happens to capture military judges in their role as officers. In her decision, she put forward the fact that, contrary to the legal impact resulting from the CDS Order dated 2 October 2019 targeting military judges specifically, the factual situation she had before her was different because there was no specific or explicit reference to military judges in any document adduced at the hearing, allowing the application of the CSD's regime dealing with a service offence to CAF officers holding the office of military judges. Consequently, from her perspective, it does not present the same risk and systemic concerns as the Military Judges Inquiry Committee is able to operate as it is established within the *NDA*.

[82] For me, the factual basis to decide this case is the same as the courts martial had to deal with in *Pett*, *D'Amico*, *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. The CSD's regime dealing with a service offence continues to capture military judges in their role as officers, no matter how it is achieved by the executive, explicitly or implicitly.

[83] Considering that the enactment by Parliament of the provisions of the *NDA* respecting the Military Judges Inquiry Committee had the effect of prohibiting the application of the CSD's regime dealing with a service offence to military judges, applying the principle of judicial comity brings me to conclude in the same way as other court martial decisions involving the same legal issue.

[84] Consequently, applying the principle of judicial comity, and concluding that there is no reason for not doing so, I am of the view that for this reason, I have to conclude in the exact same way as previous court martial decisions that a reasonable person fully informed of all the circumstances would consider that military judges do not enjoy the necessary guarantees of judicial impartiality, and as such, the right of Corporal Christmas to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter* is infringed.

Justification under section 1 of the Charter

[85] As mentioned in my previous decisions, given the vital role played by judicial independence in the Canadian constitutional structure, the standard application of section 1 of the *Charter* cannot alone justify an infringement of that independence. It can only be justified where there are "dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy", and a government must present convincing evidence to justify such infringement (*Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 at paragraphs 72 and 73; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, paragraph 97).

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

The remedy

[87] As I said previously, this issue is not new. It was raised before courts martial in November 2019, resulting in the issuance of many decisions by them over the last eleven months.

[88] Other than the first two court martial decisions in *Pett* and *D'Amico* where judicial restraint was applied, anything less than a stay of the proceedings had to be considered and used as a remedy in the most recent decisions in *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. Putting in application the principle of judicial comity makes it very difficult for me to conclude differently.

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

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

[91] The test consists of three following requirements (*R. v. Babos*, 2014 SCC 16 at paragraph 32):

> (a) the prejudice must be manifested, perpetuated or aggravated through the conduct of a trial or by its outcome;
>
> (b) no other remedy can redress the prejudice, and
>
> (c) where the first two inquiries leave uncertainty, a balancing of the interests in favour of granting a stay against the interest that society has in making a final decision on the merits weighs in favour of a stay.

[92] As I concluded in *Edwards*, *Crépeau* and *Fontaine*, the infringement of the right of Corporal Christmas under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal will continue to be manifested, perpetuated, and especially aggravated if the Court proceeds with the charge, as the issue of the independence of the military judge presiding at her court martial remains entirely, even if the matter is reconvened and proceed.

[93] As my colleague Pelletier M.J. did in *Iredale*, and as I did previously in other decisions, I have considered the interest of society in seeing that a member of the CAF be brought to answer for her actions before a court martial, especially in this case,

when it is alleged she has committed sexual assault and behaved in a disgraceful manner related to conduct of a sexual nature. I am also mindful of the fact that a stay of proceedings would prevent a complainant from having his claims of wrongdoing heard. I have also considered the severity of the interference with judicial independence highlighted in the circumstances of this case. I have concluded, as I have done before and as my colleague has, that the interest in preserving judicial independence trumps any interest in continuing the proceedings.

[94] Considering the vital and crucial role played by judicial independence in the Canadian constitutional structure and in the military justice system concerning courts martial, the interest of Corporal Christmas to a hearing by an independent and impartial tribunal does clearly outweigh the interest society has in obtaining a final decision on the merits of the case. There is no other way to maintain the public trust and the confidence of persons subject to the CSD towards judicial impartiality, and as such, judicial independence of military judges. All service members subject to the CSD are entitled to a truly independent military judiciary, as established by Parliament and in accordance with the Constitution of Canada. Consequently, I conclude that a stay of proceedings is appropriate here as a last resort in what is the clearest of cases.

FOR ALL THESE REASONS, I:

[95] **GRANT** the application made by Corporal Christmas.

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

[97] **DECLARE** that CFOO 3763 to be of no force or effect as it pertains to paragraph 9, applicable to any disciplinary matter involving CAF officers holding the office of military judge.

[98] **DIRECT** that, pursuant to subsection 24(1) of the *Charter*, the proceedings of this Standing Court Martial in respect of Corporal Christmas convened on 13 August 2020 be stayed.

Counsel:

Captain C. Da Cruz and Major A. H. Bolik, Defence Counsel Services, Counsel for Corporal K.L. Christmas, Applicant

The Director of Military Prosecutions as represented by Lieutenant-Colonel D.G.J. Martin and Major M. Reede, Respondent

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List of Exhibits

The following exhibits were filed with the Court:

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

(b) PP1-2 Seventeen-page document, RESPONSE OF THE RESPONDENT TO THE APPLICATION FOR A STAY OF PROCEEDINGS PURSUANT TO PARAGRAPH 11(d) AND 24(1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*;

(c) PP1-3 CHARGE SHEET;

(d) PP1-4 Two-page document, CDS ORDER, DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763, 2 Oct 19;

(e) PP1-5 Two-page document, 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, signed 15 Sep 20;

(f) PP1-6 Two-page document, CANADIAN FORCES ORGANIZATION ORDER 3763 – OFFICE OF THE CHIEF MILITARY JUDGE (OFFICE OF THE CMJ), 27 FEB 08;

(g) PP1-7 Six-page document, CANADIAN FORCES ORGANIZATION ORDER 0002 – CANADIAN FORCES BASE OTTAWA-GATINEAU, 29 OCT 19;

(h) PP1-8 Four-page document, CDS ORDER - DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO CERTAIN OFFICERS AND OTHER RANKS ON THE STRENGTH OF THE NATIONAL DEFENCE HEADQUARTERS, 14 Jun 19;

(i) PP1-9 Two-page document, Agreed Statement of Facts;

(j) PP1-10 Two-page document, CDS ORDER, DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763, 19 Jan 18;

(k) PP1-11 Three-page document, CDS ORDER - DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO CERTAIN OFFICERS ON THE STRENGTH OF THE NATIONAL DEFENCE HEADQUARTERS AND TO THE OFFICERS OF THE RANK OF LIEUTENANT-GENERAL/VICE-ADMIRAL, 5 Jan 18;

(l) PP1-12 CDS 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 Feb 97

(m) PP1-13 MINISTERIAL ORGANIZATION ORDER 2000007, 7 Feb 00

(n) PP1-14 Five-page document, CANADIAN FORCES ORGANIZATION ORDERS 0002 – CANADIAN FORCES SUPPORT UNIT (OTTAWA) (CFSU (OTTAWA)), 9 Aug 13;

(o) PP1-15 Twelve-page document, Bundle of Notices of Appeal (*Crépeau*, *Edwards*, *Fontaine*, *Iredale*);

(p) PP1-16 Sixty-four-page document, CONSTITUTIONAL REMEDIES IN CANADA, 2ND EDITION, CARSWELL; and

(q) PP1-17 Thirty-seven-page document, Bundle of Collection of CFOO.