COURT MARTIAL

Citation: *R. v. Proulx*, 2020 CM 4012

Date: 20201124
Docket: 201974

Preliminary Proceeding

Asticou Centre
Gatineau, Quebec, Canada

Between:

Sergeant S.R. Proulx, Applicant

- and -

Her Majesty the Queen, Respondent

Application heard and decision rendered in Gatineau, Quebec, on 13 November 2020.
Written reasons delivered in Gatineau, Quebec, on 24 November 2020.

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

FINDING ON A DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS

Introduction

[1] Sergeant Proulx has been ordered to appear before a General Court Martial on 23 November 2020 to face four charges on a charge sheet dated 18 December 2019. It is alleged that he disobeyed lawful commands of a superior officer in violation of section 83 of the *National Defence Act* (*NDA*), by entering a parking garage at his workplace and by not completing an online course, on 15 and 31 May 2019 respectively. He is also charged under section 85 of the *NDA* for behaving with contempt towards the same officer for the failure to complete what appears to be the same online course on 31 May 2019. Finally, Sergeant Proulx is charged under section 129 of the *NDA* with conduct to the prejudice of good order and discipline for asking a peer to lie for him to a superior officer on 15 May 2019.

[2] In this application filed under section 187 of the *NDA* a few days ahead of his scheduled trial, Sergeant Proulx submits that a military judge presiding a court martial is not an independent and impartial tribunal as required by paragraph 11(*d*) of the *Canadian Charter of*

Rights and Freedoms (*Charter*). As a result, he demands that the proceedings of the General Court Martial be stayed, as well as declarations that sections of the *NDA* dealing with liability under the Code of Service Discipline (CSD) and control and administration be declared of no force or effect. The applicant further requests that a number of Ministerial and Chief of the Defence Staff (CDS) orders be declared to have been made in violation of his rights under paragraph 11(*d*) of the *Charter*.

[3] I heard the application on 12 and 13 November. In consideration of a request from counsel that the decision be communicated to them before they engage in extensive trial preparations, I decided from the bench late on 13 November 2020 that the application is granted in part, that the right of Sergeant Proulx under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal has been violated and directed that, pursuant to subsection 24(1) of the *Charter*, the proceedings of the General Court Martial be stayed. What follows are the reasons for this decision.

Background

[4] Although the independence of courts martial have been challenged from time to time in the past, this application is directly related to a string of complaints which dates from a year ago. In November 2019, Master Corporal Pett challenged the judicial independence of military judges, alleging that the insufficient separation between the conflicting roles of military judges as judicial and executive officers violated his right to be tried before an impartial and independent tribunal guaranteed at paragraph 11(*d*) of the *Charter*. The origins of this alleged insufficient separation in the roles of military judges were to be found in a number of orders, especially an order by the CDS dated 2 October 2019 (the October 2019 CDS Order) which was described as the symptom best illustrating that ailment. That order, specifically two paragraphs where the CDS confers disciplinary power over military judges to specific officers in the executive, was alleged to be impugning judicial independence in a manner which could not be sufficiently remedied by the institutional background of the military judiciary.

[5] The application was dismissed as I refused to stay the proceedings as requested. In written reasons released on 10 January 2020 in *R v. Pett*, 2020 CM 4002, I found that there were sufficient safeguards in place in the applicable legislation and regulations to allow military judges to perform their judicial duties in a manner which met *Charter* requirements.

[6] However, I also found that paragraphs 1(b) and 2 of the October 2019 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. It targets military judges directly as subjects of the disciplinary regime applicable to officers of the Canadian Armed Forces (CAF) and administered by the executive, without due consideration to the Military Judges Inquiry Committee (MJIC), the safeguard mechanism provided for in the CSD to address allegations of misconduct involving military judges and administered by members of the judiciary. Consequently, I found that a reasonable person fully informed of all the circumstances would consider that military judges do not enjoy the necessary guarantees of judicial impartiality. Given the novelty of the issue, the appropriate remedy for this violation was a formal pronouncement, under the authority of section 179 of the *NDA*, to the effect that paragraphs 1(b) and 2 of the October 2019 CDS Order were of

no force or effect. I held that such a declaration, combined with the findings in the decision as it pertains to the limits in the application of the disciplinary regime administered by the executive to an officer also holding the office of military judge, was sufficient to alleviate the perception that the court martial might be anything less than an independent and impartial tribunal. Following trial, Master Corporal Pett was found guilty and sentenced to a reprimand and a fine in the amount of $1,500.

[7] Six weeks after the *Pett* decision, in *R. v. D'Amico*, 2020 CM 2002, my colleague Sukstorf M.J., seized with the same application, arrived at the same conclusion and remedies as I had in *Pett*, also finding that paragraphs 1(b) and 2 of the October 2019 CDS Order, which by then was still in force, were 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.

[8] As courts martial started again in June 2020 following a pause due to the pandemic, the October 2019 CDS Order was still in force. Applications similar to the ones in *Pett* and *D'Amico* were heard in the cases of Leading Seaman Edwards and Captain Crépeau on 26 and 29 to 30 June 2020 respectively. On 10 July 2020, in a decision published as *R. v. Bourque*, 2020 CM 2008, my colleague Sukstorf M.J. decided to adjourn and hear a similar application by Major Bourque on 13 July, indicating that if the CDS did not take advantage of the adjournment to rescind the October 2019 CDS Order, she would expect an explanation as to why. However, on 13 July the application was abandoned when Major Bourque agreed to plead guilty and was fined $200.

[9] On 14 August 2020, my colleague d'Auteuil M.J. released two decisions, published as *R. v. Edwards*, 2020 CM 3006 and *R. c. Crépeau*, 2020 CM 3007, in which he found in both cases that the accused's right under paragraph 11(*d*) of the *Charter* was violated by the continued effect of the October 2019 CDS Order. As a remedy, he ordered a stay of proceedings given the failure on the part of the executive to act in relation to the Order since it had been declared to be unlawful in *Pett* and *D'Amico*.

[10] On 10 September 2020, 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 after finding that the October 2019 CDS Order violated the right of the accused to a hearing before an independent and impartial tribunal.

[11] The next day, on 11 September 2020, I decided to stay the proceedings against Captain Iredale, explaining in written reasons published a few days later as *R. v. Iredale*, 2020 CM 4011 how the accused's rights under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal had been infringed by paragraphs 1(b) and 2 of the October 2019 CDS Order. In directing pursuant to subsection 24(1) of the *Charter* that the proceedings be stayed, I indicated my agreement with my colleague judges that the lack of action of authorities in respect of the October 2019 CDS Order required the more significant remedy of a stay to be meaningful to Captain Iredale and place him in the same position as the accused in *Edwards*, *Crépeau* and *Fontaine*.

[12] At the time I heard and decided the application in *Iredale*, I was informed by the prosecution that the previous decisions of my colleague d'Auteuil M.J. in the matters of *Edwards*, *Crépeau* and *Fontaine* were being appealed to the Court Martial Appeal Court (CMAC). I was also told at the hearing that a cross-appeal was filed in the *Crépeau* case, where the applicant had requested unsuccessfully that sections 12, 18 and 60 of the *NDA* be declared of no force or effect. This is the legislation governing the power, specifically by the CDS, to make regulations and be charged with the control and administration of the Canadian Forces and, as it pertains to section 60, governing liability under the CSD, including under the disciplinary regime applicable to CAF officers. In *Iredale*, I also refused to declare these provisions to be of no force or effect.

[13] *Iredale* was the fourth decision in which stays of proceedings were ordered in the span of less than a month. That decision was also the subject of an appeal by the Director of Military Prosecutions (DMP) on behalf of the Minister of National Defence (MND). Within a few days, on 15 September 2020, the CDS issued an order to suspend his 2 October 2019 Order in its entirety, pending the final determination of the appeals in *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. I have attached a copy of this 15 September 2020 order as Annex A to this decision and will henceforth refer to it as "the Suspension Order".

[14] On 7 and 8 October 2020, Sukstorf M.J. heard an application targeting the Suspension Order. The applicant alleged that, despite the suspension of the October 2019 CDS Order, an alleged violation of an accused's right to a hearing by an independent and impartial tribunal pursuant to paragraph 11(*d*) of the *Charter* could still be found. In written reasons delivered on 23 October 2020 in *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012 (hereinafter known as *MacPherson et al.*) Sukstorf M.J. dismissed the application in its entirety. That application was similar to the one before me today.

[15] On 26 October 2020 my colleague d'Auteuil M.J. heard another application quite similar to this one and the application before Sukstorf M.J. in *MacPherson et al.*, at least as it pertains to the independence and impartiality of military judges following the Suspension Order. In an oral decision rendered on 10 November 2020, he granted the application by Corporal Christmas for a stay of proceedings on the basis that her right under paragraph 11(*d*) of the *Charter* to a hearing before an independent and impartial tribunal had been violated. The decision has since been published as *R. v. Christmas*, 2020 CM 3009.

Position of the parties

Applicant

[16] The applicant challenges the institutional independence of military judges on two levels. First, it is submitted that the Office of the Chief Military Judge (OCMJ), the unit to which military judges belong in the CAF structure, does not benefit from a sufficient degree of judicial independence on an administrative basis from the executive to ensure the judicial impartiality of military judges at the institutional level. Secondly, it is submitted that military judges, by virtue of the fact that they can still be charged as officers under the disciplinary regime of the CSD

administered by the executive, lack the required judicial impartiality to be perceived as independent and impartial by a reasonable, well-informed person.

[17] On the basis of these arguments, the applicant requests a declaration to the effect that his right to be tried by an independent and impartial tribunal as required by paragraph 11(*d*) of the *Charter* has been violated. As a remedy for this violation, he requests that the proceedings of the General Court Martial be stayed under section 24(1) of the *Charter*. The applicant also requests that sections 60, 12, 17 and 18 of the *NDA* be declared of no force or effect. This is the same request made in *Crépeau*, with the addition of section 17 of the *NDA*, which gives to the MND the power to organize the Canadian Forces in a number of elements. The applicant finally requests that a number of Ministerial and CDS Orders passed under the authority of sections 17 and 18 be declared a violation of his right to be tried by an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*.

Respondent

[18] For its part, the respondent submits that, under its current structure, the OCMJ enjoys a sufficient degree of administrative and financial independence from the executive to meet the requirements of judicial independence and institutional impartiality. As it pertains to the continued liability of military judges vis-à-vis the disciplinary regime applicable to officers, the respondent submits that as the October 2019 CDS Order is not currently in force, there no longer remains any threat to judicial impartiality when one takes into account the law set by military judges in their precedent decisions to the effect that they are not liable to be charged and dealt with as officers by members of the executive while holding the office of military judge.

[19] The respondent submits that should a violation of paragraph 11(*d*) of the *Charter* be found despite or as a result of the Suspension Order a stay of proceedings would not be warranted to remedy the violation.

Evidence

[20] A number of exhibits were filed by consent of the parties, consisting of the foundational documents for the General Court Martial, namely the charge sheet, convening order and order to assemble as well as other exhibits produced in similar applications. These include a copy of the orders impugned by the applicant and copies of previous orders of a similar nature, namely Canadian Forces Organizational Orders (CFOOs) and Ministerial Organizational Orders (MOOs) applicable to the OCMJ, the Canadian Forces Support Unit Ottawa (CFSU(O)) or its successor, Canadian Forces Base Ottawa-Gatineau, as well as other units and elements of the CAF. Notices of appeal in several matters were also entered as exhibits, along with the memorandum of fact and law of the appellant in the matters of *Edwards*, *Crépeau*, *Fontaine* and *Iredale* at the CMAC. As mentioned earlier, a copy of the Suspension Order appears at Annex A. I will also refer to some of the other exhibits in the course of my analysis. I do not see the need to annex any other exhibit nor attach a detailed list of exhibits to this decision.

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

Analysis

Introduction

[22] The hearing on this application, especially the detailed review by counsel of the numerous and detailed decisions of my two colleagues who have weighed in on the issue of the independence of military judges in recent months, revealed that many words have been written on the issue since the release of the decision in *Pett* in January 2020. The volume of what has been written indicates that each military judge decided to forge his or her own path. Now that the matter has been placed squarely on the shoulders of the CMAC, I will resist the urge to engage in legal archaeology or address every possible argument and issue. The decision I wrote in *Pett* has been extensively quoted by colleagues and by Martineau J. of the Federal Court of Canada in *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 CF 330. It provides an adequate framework for the analysis and resolution of the issues raised by this application, especially as it pertains to the impact of the more recent Suspension Order. I will therefore build on *Pett* and not build another *Pett*. Yet, these reasons will still be lengthy given the complexity of the issue.

[23] *Pett* has been referred to almost exclusively as a decision on the impact and legality of the October 2019 CDS Order. This can be explained by the fact that it is that order which triggered the application and the challenge on the independence of military judges. Yet, *Pett* is more than that.

[24] In first challenging the independence of military judges, counsel for Master Corporal Pett framed the issue generally as one of insufficient independence of military judges given tensions between their roles as officers in the CAF, members of the executive and as judges, members of the judiciary. This lack of independence was described as the ailment or disease affecting the military judiciary. The October 2019 Order was described as a symptom of that disease.

[25] The decision in *Pett* had to address the disease complained of and deal with multifold arguments. First, the extent of the symptom was analyzed to confirm whether and how the legal framework of the CSD allowed the prosecution of officers holding the office of military judge through actions of executive officials, especially from the chain of command. That analysis confirmed that the symptom was real. The second step involved the determination as to whether that one symptom was linked to the disease, specifically whether the liability of officers holding the office of military judge to the disciplinary regime applicable to CAF officers administered by members of the executive raised concerns of judicial impartiality. It was found to be the case. Consequently, the third step of the analysis in *Pett* analyzed whether there were existent safeguards to alleviate both the specific symptom and other complaints raised by the applicant. It was found that safeguards existed, especially the MJIC which addressed the specific symptom complained of. However, in a fourth step, the October 2019 CDS Order was found to undermine this safeguard to the extent that a reasonable person fully informed of all the circumstances who

read the order would consider that military judges do not enjoy the necessary guarantees of judicial impartiality. Finally, as it pertains to remedy, it was decided in *Pett* that a declaration of invalidity of the October 2019 CDS Order, coupled with the law set as part of the decision, to the effect that military judges are immune from disciplinary measures administered by the executive for as long as they hold their office, would suffice as long as this law was acknowledged and action was taken in relation to the impugned October 2019 CDS Order.

[26] The analysis performed in *Pett* somewhat narrowed the description of the disease initially identified as the alleged insufficient independence of military judges in relation to the executive. Once other symptoms allegedly revealing lack of independence had been ruled out in the analysis, the only expression of the lack of independence that remained to be addressed was the possibility, under the legislative, regulatory and organizational framework, that an officer holding the office of military judge could be charged and dealt with under the disciplinary regime administered by members of the executive. That is how this situation came to represent the narrow view of the disease and was closely linked with the October 2019 CDS Order symptom.

[27] The current application alleges additional symptoms pointing to a lack of judicial independence of military judges. It brings back the general nature of the disease and requires analysis beyond what was performed in the cases which followed *Pett*, such as *Bourque*, *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. These cases understandably focused on the narrow view of the disease and whether the symptom identified as the October 2019 CDS Order had been cured, especially given the closing paragraphs in *Pett* which called for action to be taken in relation to said order. Some would argue that the main symptom identified in *Pett* has been cured with the release of the Suspension Order by the CDS on 15 September 2020; however, this does not mean that the disease no longer exists. Pending a contrary conclusion from the CMAC, the disease will only be cured when the law set in *Pett* is acknowledged and action is taken in relation to any other symptom which may appear and be perceived by a reasonable well-informed person as threatening military judges' impartiality.

Issues

[28] What is at issue for this application is not only the symptom revealed by the October 2019 CDS Order; it is whether the law set in *Pett* is being acknowledged pending the result of appeals and whether any other symptom has surfaced which would indicate that the general ailment or disease identified in *Pett* has not been cured.

[29] On the basis of the submissions of parties and circumstances applicable at the time of the hearing of this application, I believe the following issues require resolution:

(a) first, whether the OCMJ benefits from a sufficient degree of judicial independence on an administrative basis from the executive to ensure the judicial impartiality of military judges at the institutional level;

(b) second, whether military judges, by virtue of the fact that they can still be charged as officers under the disciplinary regime applicable to officers and administered

by the executive, lack the required judicial impartiality to be perceived as independent and impartial by a reasonable, well-informed person on the basis of the Suspension Order or other orders;

(c) third, given previous and contradictory decisions by other military judges in similar applications, whether and to what extent the principle of judicial comity directs the resolution of this application in a given way; and

(d) finally, the identification of the remedy that could best address any violation.

[30] I find that although the OCMJ does benefit from sufficient independence, the Suspension Order fails to acknowledge the law set in *Pett* to the effect that an officer holding the office of military judge cannot be charged and dealt with under the disciplinary regime administered by members of the executive while in office. That order could even be considered as an additional symptom indicating that the general ailment or disease identified in *Pett* has not been cured. Despite recent contradictory decisions, the principle of judicial comity does not preclude a finding to the effect that the right of Sergeant Proulx to be tried by an independent and impartial tribunal under paragraph 11(*d*) of the *Charter* has been violated. The remedy that could best address this violation is a stay of the proceedings of his General Court Martial.

First Issue: Do military judges lack administrative and institutional independence by virtue of the status of the OCMJ from an organizational and budgetary perspective?

Introduction

[31] The applicant submits that military judges lack the sufficient administrative and institutional independence necessary to be perceived as independent and impartial by a reasonable, well-informed person. Pointing to organizational orders and documents such as MOOs and CFOOs, he submits that the OCMJ, set up by the executive, is unlike any other court in Canada and does not have the same protection. As mentioned, he asks that the legislative provisions allowing the organization of the OCMJ by the MND and the CDS at sections 17 and 18 of the *NDA* as well as the power to make regulations found at section 12 be found to be of no force or effect.

[32] This specific argument was not formulated prior to September 2020; however, the organizational instruments relevant to the OCMJ were known to military judges at the time the most recent judicial independence claims were being raised starting in November 2019.

Organization of the OCMJ

[33] In its submissions, the applicant grounds his argument in a way which equates the OCMJ with a court. Referring to legislative instruments at the provincial and federal levels as well as memoranda of understanding, it is argued that the absence of similar instruments governing the relationship between the OCMJ and the executive demonstrates a lack of independence. Yet, that starting point is flawed. The OCMJ is not the equivalent of a court and is not meant to be so. The reports from Lamer and Lesage JJ. as to the establishment of a permanent military court of

record were discussed at paragraphs 54 to 57 in *Pett*. Yet, the creation of a permanent court was not described as an essential constitutional requirement in these reports. Although I share the views of these eminent jurists to the effect that a permanent court would be a positive development, I have concluded at paragraph 57 of *Pett*, referring to the Supreme Court of Canada decision in *R. v. Lippé,* [1991] 2 SCR 114, that the constitutional protections of judicial independence do not guarantee the ideal.

[34] The fact that military judges have been placed, for organizational purposes, in the OCMJ does not, in my view, raise perception concerns for an informed person. As currently organized, the OCMJ includes personnel performing both the adjudicative functions and the administrative support for these judicial functions. Even if the OCMJ could be seen as a tool of the executive given its function of supporting the administration of justice at courts martial, the same could be said of court administration services in provinces and in the federal sphere. The OCMJ, as the name suggests, is closely associated with the Chief Military Judge, a judicial official whose role is defined at sections 165.24 to 165.27 of the *NDA* and who has been designated for organizational purposes as its commanding officer. Furthermore, the other key member of the OCMJ, the Court Martial Administrator (CMA), acts under the general supervision of the Chief Military Judge, as provided for at subsection 165.19(3) of the *NDA*. The OCMJ is a stand-alone entity that is not assigned to any command of the CAF.

[35] The organizational, regulatory and legislative framework applicable to the OCMJ ensures that the matters pertaining to institutional independence discussed by Le Dain J. of the Supreme Court of Canada at paragraph 49 of *Valente v. The Queen*, [1985] 2 S.C.R. 673 are met. Indeed, counsel did agree at the hearing that there is, in relation to courts martial, judicial control over the essential requirement for institutional independence, namely the core matters such as assignment of judges, sittings of the court and the court martial calendar, the equivalent of the court lists. The Chief Military Judge provides direction to the CMA as required, in relation to the administrative staff of the OCMJ engaged in supporting these core functions, for instance in producing the convening order and the order to assemble for a General Court Martial such as this one.

[36] It is understood, however, that a court martial is an ad hoc event. To allow it to occur, arrangements need to be made with CAF units having responsibility, under *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 111.12, to support the court martial. That is how the facilities to host the court, often in a make-shift courtroom on a military establishment, are provided, and accompanied with support staff to ensure that proceedings can be conducted in a dignified and military manner. Even if these facilities and staff are not permanently under the direction of the judiciary, they are under the control of the military judge for the duration of the proceedings and, in any event, are not in any way engaged in any matter directly affecting adjudication. Courts martial are not unique in sitting in makeshift facilities: trials have been, and continue to be, held in such settings at many levels of courts in Canada.

Budget and financial resources

[37] As it pertains to budgets, the OCMJ receives its funding from the executive and as such must comply with financial procedures such as business planning. However, these matters do not

fall within the scope of administrative independence as they do not bear directly and immediately on the exercise of the judicial function, as decided by the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 at paragraph 253.

[38] I wish also to add that, in practice, the way the military judiciary performs its functions is different than that of judges belonging to permanent courts of record. As courts martial are ad hoc events and require independent funding to operate for each court being convened, a military judge will not be placed in a position to make a decision unless and until the specific court martial he or she is presiding is funded. As specified in article 111.13 of the QR&O, the administrative instructions issued by the CMA will specify the financial authorities and limitations that apply in respect of the conduct of the court martial. In short, if the executive cuts the funding, the court will not take place and consequently the military judge will have nothing to decide.

[39] Similarly, should the Minister or the CDS decide to disband the OCMJ and leave military judges without support, they will not be performing their judicial duties and render decisions. No accused will be brought before them. Military judges will remain in their offices or home, unless and until Parliament abolishes trials by courts martial by amending the *NDA*.

Conclusion

[40] I have not been convinced that the organizational and budgetary framework governing the adjudicating work and judicial functions of military judges raises issues of independence from the executive that would give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person on an institutional or structural level. This conclusion is aligned and completes the conclusion reached at paragraph 84 of *Pett* as it pertains to administrative processes generally and is similar to the conclusion reached by my colleague Sukstorf M.J. at paragraph 49 of her decision in *MacPherson et al*. It also disposes of the applicant's argument as to the constitutionality of sections 12, 17 and 18 of the *NDA*.

Second Issue: Did the Suspension Order have the effect of removing judicial impartiality concerns for a reasonable, well-informed observer?

Introduction

[41] The applicant's argument, in relation to this second issue, is developed in two prongs or complaints. In a first prong, the applicant complains that military judges can still be charged and dealt with by members of the executive under the disciplinary regime applicable to CAF officers despite the suspension of the October 2019 Order, as evidenced by instruments such as CFOO 3763, governing the organization of the OCMJ. The applicant argues that this continued liability prevents military judges to be perceived as independent and impartial. In a second prong to his argument, the applicant alleges that the way the October 2019 CDS Order was suspended is not only insufficient to alleviate judicial impartiality concerns but should also be seen as exacerbating them. The applicant submits that the text of the Suspension Order, seen in the context of decisions made by military judges in the last months, would lead a reasonable,

informed observer to conclude that military judges do not enjoy the required level of judicial impartiality.

First complaint – continued liability of military judges

[42] The fact that military judges can still, from a legislative, regulatory and organizational perspective be technically charged and dealt with by members of the executive under the disciplinary regime applicable to all CAF officers, even without the October 2019 CDS Order, is agreed to. It was known at the time *Pett* was decided: The analysis of the first question reveals that military judges are subject to the CSD without limitation, as provided for at section 60 of the *NDA*. The closing sentence of paragraph 109 reveals that as officers within the OCMJ they could be disciplined within the organizational structure applicable to other officers serving at National Defence Headquarters (NDHQ).

[43] What precludes this outcome from materializing, however, is the law that has been set in *Pett* to the effect that military judges are immune from being charged and dealt with by members of the executive under the disciplinary regime applicable to CAF officers while they hold their office of military judges. This result was arrived first by finding at paragraphs 38 to 62 that the liability of officers holding the office of military judge under a disciplinary scheme applicable to officers raises judicial impartiality concerns. Then, the examination of a number of safeguards which allegedly alleviated these concerns resulted in a finding at paragraph 104 that the safeguard which would preclude any reasonable apprehension of bias in relation to disciplinary processes was the proper and efficient operation of the MJIC as the primary mechanism for military judges' discipline. In the discussion that immediately followed on the impact of the October 2019 CDS Order on that specific safeguard, it was demonstrated at paragraphs 111 to 116 that a number of legal and practical considerations reveal that the very purpose of that Order ran against the legislative intent in creating an efficient and meaningful disciplinary system for judges.

[44] This finding and statement of the law as to the immunity of military judges to the disciplinary processes applicable to all CAF officers has been supported by all three military judges who dealt with this issue, with the minor exception of a nuance by my colleague Sukstorf M.J., mentioned at paragraph 102 of *MacPherson et al*., pertaining to what she sees as a need to avoid a potential gap in jurisdiction should a military judge commit a criminal offence outside of Canada. That nuance was rejected by my other colleague d'Auteuil M.J., who held that the prohibition on the executive pursuing the prosecution of a military judge should suffer no exception. I agree with him. I explained at paragraph 36 of my decision in *Iredale* the practical difficulties of the nuance. I can add that I respectfully do not see how there could be a gap in jurisdiction: by virtue of the law set in *Pett* and since, the military judge against whom an allegation of criminal behaviour could be made outside of Canada would be liable under the CSD, first to the MJIC, then to a disciplinary process administered by the executive if and once he or she is no longer in office. In practice this is an extremely unlikely occurrence, not only because military judges are not statistically prone to criminal behaviour, but also because a review of court martial proceedings since the creation of the OCMJ in the fall of 1997 reveals that in over twenty-three years, military judges have sat a maximum of forty days outside of Canada in presiding twelve trials, the last time in 2012. The nuance proposed by my colleague

Sukstorf M.J. places military judges at the mercy of members of the executive in certain circumstances. Yet it is not sufficient for military judges to be seen as independent in most circumstances. In my respectful view there should be no exception to the principle laid out in *Pett*.

[45] Paragraphs 47 to 51 of my decision in *Iredale* explain why statements of law by courts martial in matters relevant to the exercise of their jurisdiction are authoritative, even when there is an appeal. My colleague Sukstorf M.J. has weighed in support and brought additional authoritative comments on that issue at paragraphs 69 to 72 of her decision in *MacPherson et al*.

[46] *Pett* found there was no need to expressly exempt military judges, numbering from two to five, from general orders applicable to the whole or part of the CAF, as long as the law immunizing military judges was accepted and could be seen as such. I therefore have no hesitation in building on the finding in *Pett*, applied in other cases, to the effect that the absence of express exclusion of military judges from the operation of the disciplinary regime of the CSD administered by members of the executive under the applicable legislation, regulations and orders does not constitute, in itself, a violation of judicial impartiality. It is so by virtue of an important remedy ultimately applied in *Pett* in the form of a clear statement of law to the effect that military judges are immune to disciplinary measures by members of the executive for as long as they hold their office.

[47] This resolves the first complaint formulated by the applicant: even if it could be technically possible, military judges cannot be charged and dealt with by members of the executive under the disciplinary regime applicable to officers of the CAF because such actions have been held to be contrary to the law. Consequently, a reasonable, well-informed person should be reassured that military judges and courts martial possess the required institutional impartiality to be considered an independent and impartial tribunal under paragraph 11(*d*) of the *Charter*.

[48] By virtue of that law, that same reasonable observer will be able to look at instruments which apply to a defined group of military personnel, which happens to include officers who are also military judges, and conclude that they cannot be used to discipline military judges under the scheme applicable to all officers. To be clear, such orders would include MOO 2000007 and CFOO 3763, governing the organization of the OCMJ as well as the CDS Order of 14 June 2019 designating commanding officers for officers on strength at NDHQ. Consequently, these instruments do not violate the applicant's right under paragraph 11(*d*) of the *Charter*. The same ruling applies to any other legislative and regulatory instrument of general application such as section 60 of the *NDA*, which was specifically discussed at paragraphs 117 to 121 in *Pett*.

[49] That having been decided, we have to keep in mind the conclusion at paragraphs 146 and 147 in *Pett*, to the effect that the remedies designed in that case would suffice as long as the law it sets up was acknowledged and action was taken in relation to the October 2019 CDS Order. The absence of action has led to critical comments by my colleague Sukstorf M.J. in *Bourque* and led to stays of proceedings in the cases of *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. Since then, action was taken in relation to the October 2019 CDS Order. However, the applicant still complains that the way that order was suspended, by the Suspension Order of 15 September

2020, is not only insufficient to alleviate judicial impartiality concerns but should also be seen as exacerbating them. I need to turn to this second prong of the applicant's argument, targeting specifically the content of the Suspension Order.

Second complaint – The effect of the Suspension Order

Pett sets the framework of analysis and a cure to the disease

[50] The proper framework for the analysis of the Suspension Order can also be found in the approach developed in *Pett*.

[51] As explained, the general disease in *Pett* was insufficient independence of military judges as judicial officers towards the executive. In the course of the analysis, the description of the disease was narrowed to the possibility that an officer holding the office of military judge be charged and dealt with under the disciplinary regime applicable to CAF officers and administered by members of the executive, instead of being dealt with by the disciplinary regime administered by judicial peers. Cases which followed *Pett* focused on that narrow view of the disease and on whether a symptom of that disease identified as the October 2019 CDS Order had been cured. Since 15 September 2020, when the CDS issued the Suspension Order, it can be argued that the main symptom identified in *Pett* has been addressed. However, this does not mean that the disease no longer exists. The cure for the disease is not the declaration in *Pett* to the effect that the October 2019 CDS Order was null and void. That is the cure for that specific symptom. The cure for the disease was the law that has been set in *Pett* to the effect that military judges cannot be charged and dealt with by members of the executive while in office.

[52] Pending a contrary conclusion from the CMAC, the disease will be cured only when the law set in *Pett* is acknowledged and executive action is taken in relation to any other symptom which may appear and result in being perceived by a reasonable, well-informed person as threatening military judges' impartiality.

The arguments on the sufficiency of the Suspension Order

[53] What the applicant is essentially arguing is that the response of the CDS found in the Suspension Order does not constitute such an acknowledgement and, in fact, demonstrates disrespect for the law set by military judges. Consequently, it is argued that it could well be seen by a reasonable observer as an indication that any potential disciplinary action targeting military judges would be administered through the disciplinary regime applicable to all CAF officers regardless of the law set in *Pett*.

[54] The response from counsel representing the DMP is that the CDS is entitled to a presumption that he acts according to the law. The fact that he responded in suspending his October 2019 Order should be seen by a reasonable observer as a sufficient acknowledgement of the law set out in *Pett* and the attribution of any ill motive to the actions of the CDS is improper and irrelevant.

The burden to reassure the reasonable, well-informed person

[55] I do agree that the CDS enjoys a presumption that his actions respect the law. However, I wish to be clear that the unprecedented circumstances since *Pett*, of military judges declaring an order from the CDS to be unlawful, imposed an obligation or burden on the CDS to respond. This was clearly laid out at paragraph 147 of *Pett* and confirmed by subsequent judicial sanctions of the failure of the military hierarchy to respond. The nature of that response is not something judicial officials should dictate precisely.

Cancellation, Suspension, Motives

[56] A cancellation of the portions of the October 2019 CDS Order declared to be of no force or effect in the days following decisions of military judges concerning that order could have been seen as a sufficient acknowledgement of the law set in *Pett*. Indeed, such response could be reasonably linked to these decisions, as I indicated at paragraph 50 of my decision in *Iredale*. When referring to "cancellation" I alluded to the usual way orders are cancelled in the CAF, namely by a subsequent order to the effect that a specified order (named or added as a reference) is cancelled. See for instance Canadian Forces General message (CANFORGEN) 137/20 of 20 October 2020 or in fact any CANFORGEN or order deploying changes in policy, typically mentioning that previous order(s) pertaining to the subject of the new policy are cancelled. However, the words of the Suspension Order reveal that it is not that type of cancellation. Instead, it is a statement.

[57] I agree with counsel for the respondent that motive by the CDS is not relevant to the analysis. As invited by counsel for the applicant following an objection, I am considering only how the words found in the Suspension Order could be interpreted by a reasonable observer. It is the perception that counts. Yet, it is a fine line as the words of the CDS, viewed by a reasonable observer realistically and practically, may lead this person to conclude that the CDS, hence the authorities acting under him as part of the executive, do not intend to follow the law set by military judges. Given that the burden has been placed on the CDS to act, any doubt about whether the words in the September 2020 Suspension Order indicate an acknowledgement of the law set in *Pett* would indicate that the burden has not been met and that the reasonable and informed person is justified in viewing military judges and courts martial as other than independent and impartial tribunals.

[58] The Question to be resolved in my view is whether the September 2020 Suspension Order reveals, as argued by the applicant, a resurgence of the disease identified in *Pett* by a lack of acceptance for its cure or the presence of another symptom. What do the words found in the September 2020 Suspension Order tell the reasonable and informed person about the disease identified in *Pett* or the cure for that disease? Is this cure acknowledged and supported? Does the September 2020 Suspension Order reveal another symptom about the lack of independence of military judges vis-à-vis the executive?

The content of the Suspension Order

[59] The Suspension Order is attached as Annex A to this decision. It comprises five paragraphs stating facts preceded by the word "whereas" and one final paragraph commencing

by the word “therefore”, followed by the suspension of the October 2019 CDS “pending the final determination of the appeals in *R. v. Edwards, R. v. Crépeau, R. v. Fontaine,* and *R. v. Iredale”* (the five cases). What has been included in the Suspension Order is just as important as what has not been included.

[60] The Suspension Order mentions that military judges have ordered stays of proceedings in the five cases, having found that the accused persons’ right to be tried by an independent and impartial tribunal had been violated by the October 2019 CDS Order. It also mentions that it is anticipated that military judges will continue to order stays of proceedings on the same basis. It mentions that these decisions are being appealed by the MND, that the military justice system is essential to maintain the discipline, efficiency and morale of the CAF and that CFOO 3763 on the OCMJ remains in effect.

The duration of the suspension of the October 2019 CDS Order

[61] The first thing included in the order is the word “suspension” appearing first in its title. This is defined as the act of stopping or delaying something from happening, usually for a short amount of time. The October 2019 CDS Order has not been rescinded or cancelled as envisaged by military judges in previous decisions, including the five cases. This is not determinative in itself. As stated at paragraph 53 of *MacPherson et al*., the October 2019 CDS Order is no longer in force. While that is true at the time of the analysis, the suspension, as the word implies, is temporary, not permanent. A careful reading of the closing paragraph of the Suspension Order reveals that the October 2019 CDS Order is suspended “pending the final determination of the appeals” in the five cases. These appeals are those referred to earlier in the order, in which the MND has filed notices of appeal. These notices of appeal to the CMAC have been produced as exhibits in this application. These words suggest that when the appeals in the five cases are finally determined, the October 2019 CDS Order comes back into force. That is so, regardless of the outcome of the appeals. That interpretation is strengthened by an answer obtained from counsel for the respondent who confirmed at the hearing that the October 2019 CDS Order will not be in effect while the matter is being appealed and considered by the CMAC, but then the issue will be settled as far as courts martial are concerned, regardless of the potential for any subsequent appeal to the Supreme Court of Canada.

[62] Assuming that the CDS acts in good faith, I have to conclude that his Suspension Order overlooks the possibility that the determination of the appeals will result in a dismissal and confirmation that the military judges who decided the five cases did not err in law, hence that the law set by *Pett* is correct. Otherwise, the intent of the CDS would be to reactivate his October 2019 Order regardless of a contrary outcome on appeal.

[63] One would argue that this is an oversight; yet it is a revealing one. It supports the applicant’s argument to the effect that the way the appeals are being mentioned in the Suspension Order could be seen as signaling the CDS’ disagreement with the decisions rendered by military judges and an intent that the status quo returns when these decisions are overturned on appeal. More importantly, the suspension of the October 2019 CDS Order “pending the final determination of the appeals” can reasonably be seen not to cure the symptom addressed in

previous decisions: the October 2019 CDS Order will be reactivated once the appeals to the CMAC are determined.

What is not in the Suspension Order

[64] The Suspension Order does not include an acknowledgement of the disease identified in *Pett* nor an acknowledgement of the symptom revealed by the October 2019 CDS Order. It does not make any mention of the cure for the disease which brought the issue of judicial independence to the fore, namely the statement of law to the effect that military judges cannot be charged under the disciplinary regime applicable to CAF officers and administered by members of the executive while in office. To the contrary, by choosing to suspend the October 2019 Order and by referring to the appeals and their final determination as the trigger that ends the suspension, the Suspension Order suggests that the decisions made by military judges relying on that law are not supported.

What is in the Suspension Oder: mention of CFOO 3763

[65] The Suspension Order refers specifically to CFOO 3763 on the organization of the OCMJ to state that it "remains in effect". This instrument states at its paragraph 9 that military personnel in the OCMJ, which of course include military judges, are considered to be on strength at NDHQ and will be disciplined in accordance with Canadian Forces Support Unit Ottawa (CFSU(OTTAWA)) CFOO. It is true that the CFOO referred to is obviously out of date and that the disciplinary reference is no longer accurate given that CFSU(OTTAWA) has ceased to exist and the CFOO of its successor unit no longer refers to discipline. However, the mention concerning being on strength at NDHQ leads directly to a 14 June 2019 CDS Order designating a commanding officer with respect to officers "on the strength of NDHQ". The CDS has chosen to point the reader of the Suspension Order in the direction of an instrument which both refers to discipline of military personnel in an organization which includes military judges and places personnel of that organization in a category which makes them liable to be disciplined by a commanding officer he has designated.

[66] As alluded to earlier, it is not the fact that CFOO 3763 allows military judges to be charged as other military personnel in the OCMJ that is problematic. The problem is the fact that the CDS has chosen, in the very order meant to cure the symptom identified in *Pett*, which led to stays of proceedings in the five cases, to refer to an instrument allowing military judges to be charged. Such a reference was not necessary: CFOO 3763 was in force and could be used to facilitate the discipline of military personnel of the OCMJ, including former military judges if necessary, whether referred to or not. I have to agree with the applicant to the effect that the reference to CFOO 3763 may be seen by a reasonable, well-informed person as a reminder that military judges can still be disciplined under the regime applicable to officers of the CAF administered by members of the executive even with the suspension of the October 2019 CDS Order.

[67] In that way, the Suspension Order not only fails to cure the previously identified symptom, it creates a new symptom revealing that the disease—the lack of independence of military judges in relation to the executive—has not been cured. The Suspension Order therefore

constitutes a separate breach of the applicant's right to be tried by an independent and impartial tribunal as guaranteed by paragraph 11(*d*) of the *Charter*.

Conclusion

[68] This analysis reveals that a reasonable, well-informed person reading the Suspension Order would not be reassured that the disease identified in *Pett* is being addressed, as the cure proposed by military judges for that disease is not being acknowledged nor supported. Indeed, the Suspension Order:

(a) does not cure the symptom generated by the October 2019 CDS Order entirely as it appears the Order will come back into force when the appeals arrive at final determination;

(b) does not acknowledge the law set in *Pett* and followed since to the effect that military judges cannot be charged while in office; and

(c) appears to indicate that the law set in *Pett* is not being accepted.

[69] In these circumstances, I have no hesitation to conclude that in the context of the findings made in *Pett*, specifically concerning the existence of a disease and its cure, the Suspension Order will still lead a reasonable, informed person to conclude that military judges are not an independent and impartial tribunal under paragraph 11(*d*) of the *Charter.* Indeed, the reasonable person is one that is presumed informed of all of the reasons for the Suspension Order, including the reasons for the violation that had been found by military judges previously. Military judges have been found to lack the required independence because they are liable to being charged and dealt with under the disciplinary regime applicable to all CAF officers and administered by members of the executive. To conclude that military judges are independent, that person must be reassured that the executive accepts that military judges cannot be so charged and dealt with. The words of the Suspension Order do not provide that reassurance. In fact, by referring to an organizational order which stipulates that members of the unit to which military judges belong will be disciplined, it reveals yet another symptom which constitutes a separate breach of the applicant's right to be tried by an independent and impartial tribunal as guaranteed by paragraph 11(*d*) of the *Charter*.

No attempts were made to justify the violation

[70] I note that the respondent has made no attempt to demonstrate that such a violation could be justified under section 1 of the *Charter*.

Third question: Does the principle of judicial comity direct a specific disposition of this application?

Judicial comity

[71] It has been decided over five years ago in *R. v. Caicedo*, 2015 CM 4018, at paragraph 20, and accepted by military judges since, 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. The same rule has been applied at the CMAC, as evidenced by the majority decision in *R v. Déry*, 2017 CMAC 2 at paragraphs 87 to 97 and in a recent interlocutory decision by Bell C.J. in *R. v. Duquette*, 2020 CMAC 4 at paragraph 10.

[72] I asked counsel to comment in their written submissions on the application of the principle of judicial comity in light of the reasons delivered on 23 October 2020 by my colleague Sukstorf M.J. in *MacPherson et al.*, in which she dismissed an application similar to this one.

[73] These pleadings were somewhat overtaken by events given that on 10 November 2020, my colleague d'Auteuil M.J. delivered an oral decision in which he granted the application by Corporal Christmas for a stay of proceedings on the basis that her right under paragraph 11(*b*) of the *Charter* to a hearing before an independent and impartial tribunal had been violated.

[74] In *Christmas*, d'Auteuil M.J. mentioned that he was aware that his conclusion was different from the one reached by Sukstorf M.J. in *MacPherson et al.* However, after summarizing that decision and stressing the finding of fact made therein to the effect that there were no specific references to military judges in documents before Sukstorf M.J., he concluded that the factual situation he was dealing with was the same as in *Pett*, *D'Amico*, *Edwards*, *Crépeau*, *Fontaine* and *Iredale* because military judges are still liable to be charged and dealt with by members of the executive, no matter how it is achieved, explicitly or implicitly. D'Auteuil M.J. expressed the view that in applying judicial comity, he had to conclude in the exact same way as previous court martial decisions, to the effect that a reasonable person fully informed of all the circumstances would consider that military judges do not enjoy the necessary guarantees of judicial impartiality.

Judicial comity applied to this case

[75] It is apparent to me that my reasons for concluding that military judges do not enjoy the necessary guarantees of judicial impartiality are different from those of both of my colleagues. That does not violate judicial comity, as illustrated by the disposition in *Déry*, where the majority decided to dispose of the appeal in the manner decided by a different panel of the same court previously, while submitting significant reservations as to how that result was achieved. I am confronted here with two different dispositions. I am grateful for the submissions of counsel on the issue of judicial comity, in these difficult circumstances. What I gather from those is that the principle of judicial comity is not absolute: it suffers exceptions which support another important principle relevant to legal precedents, namely correctness. As found in *Caicedo*, judges can depart from judicial comity to avoid perpetuating an error in the interpretation of the law.

[76] As it pertains to the disposition of this application, I am departing from the decision made by my colleague Sukstorf M.J. in *MacPherson et al*. I feel I have a duty to explain why.

[77] Reading paragraph 40 of my colleague's reasons in *MacPherson et al*. allows me to conclude that we are in agreement as to the applicable test for both judicial independence and

impartiality, namely that of an informed person. In her conclusion as to the first question on administrative independence, she applied that test, concluding at paragraph 49 that a reasonable, well-informed person having looked at the *NDA* and its subordinate regulations would perceive that military judges enjoy administrative independence. I have arrived at the same conclusion, through a slightly different analysis.

[78] As it pertains to the second question asked in her analysis, Sukstorf M.J. does not refer to the reasonable, well-informed person test as it pertains to the words in the Suspension Order, limiting her analysis to the factual assessment that the October 2019 CDS Order is no longer in force. At the outset, she explains the limits of her analysis at paragraph 53 in these words:

> [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.

[79] It is worth noting that the "motives put forward by the applicants" were summarized at subparagraph 18(b) of her reasons. After mentioning in great length a number of safeguards strengthening the judicial independence of military judges, she concludes at paragraph 97 in these words:

> [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.

[80] It would appear that in the circumstances presented by the parties appearing before her, my colleague has decided not to analyze the words of the Suspension Order, dismissing as irrelevant the allegations by the applicant as to what message or communication the CDS was allegedly trying to send. As stated earlier, I do agree that the motives that the CDS might have had are irrelevant to the analysis. However, the perception that a reasonable person might gain from reading the words of the CDS in the Suspension Order are in my view relevant, especially given that the reasonable person is one that is presumed informed of all of the reasons for that order.

[81] Consequently, I have entered into an area of analysis that my colleague decided to avoid, in all likelihood as a result of how the Suspension Order was presented to her as one can imply from her words at paragraph 53. The conclusion that I have reached is a direct result of that distinction in the area of analysis. I therefore do not consider my conclusions to be contrary to my colleague's decision and should not be construed in any way as a finding that my colleague erred.

Conclusion on judicial comity

[82] I do believe that I was obliged, by virtue of the way the arguments of the applicant were presented to me, to analyse the impact of the wording of the Suspension Order on the perception that it could have created in the mind of a reasonable, well-informed person. It is that analysis which resulted in my conclusion, which is obviously different than the one reached by my colleague Sukstorf M.J. in *MacPherson et al.* Because of that fundamental difference on what it is that we analysed, I do not feel bound by the conclusion she previously reached as it pertains to the disposition of the matter.

[83] As it pertains to the *Christmas* precedent, I note that the main reason which allowed my colleague d'Auteuil M.J. to conclude in the violation of the right of Corporal Christmas under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal is slightly different than mine. We agreed on the result and his peripheral mention of the content of the Suspension Order seems to indicate that we feel the same way as to its potential impact on a reasonable, well-informed observer. In any event, the principle of judicial comity is not at play in relation to *Christmas*, given the result.

Final Question: What remedy or remedies would be appropriate to best address any violation?

Introduction

[84] I found that in the context of the findings made in *Pett*, the Suspension Order would not prevent a reasonable, informed person to conclude that military judges are an independent and impartial tribunal under paragraph 11(*d*) of the *Charter* simply because, in order to do so, that person must be reassured that the executive accepts that military judges cannot be charged and dealt with under the disciplinary regime applicable to all CAF officers and administered by the executive. The words of the Suspension Order do not provide that reassurance. By referring to an organizational order which stipulates that members of the unit to which military judges belong will be disciplined, the words of the Suspension Order unveil another symptom which constitutes a separate breach of the applicant's right to be tried by an independent and impartial tribunal as guaranteed by paragraph 11(*d*) of the *Charter*.

[85] Violations having been found, thus the issue of remedy becomes relevant. The applicant seeks a number of declarations and an order under subsection 24(1) of the *Charter* declaring a stay of proceedings as an appropriate and just remedy.

Stay of proceedings

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

> (a) the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
>
> (b) there must be no other remedy capable of redressing the prejudice; and

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

Respondent's position

[87] The respondent concedes that when a court has found that the continuation of the trial of an accused before it would violate that accused's right to be tried by an independent and impartial tribunal, the first prong of the test has been met. However, as a stay of proceedings remains a remedy of last resort, the respondent submits that other available remedies should be considered, especially in the circumstances of this case where we are not dealing with a failure to act, as in previous cases where stays were ordered, but rather with a novel situation due to the Suspension Order. In short, the respondent argues that judicial restraint as shown in *Pett* should be applied, even to the point of considering proceeding with the General Court Martial, perhaps after an adjournment that would allow the correction of any deficiency observed. Alternatively, it is submitted that I should consider imposing a termination of proceedings.

The remedy must be meaningful

[88] I wish to be clear that I do not consider this decision to be a "reset" to the situation that prevailed when *Pett* was decided. For the reasons explained above, the cure for the disease has been clearly laid out in the reasons in *Pett*, especially in the conclusion at paragraphs 146 and 147 and has been out there for everyone to see. What we had in *Edwards*, *Crépeau*, *Fontaine* and *Iredale* was a failure to act. What we have now is a failure to act appropriately. Yet, I do not see how that difference would justify opting for a radically different remedy. Given the situation that courts martial have been confronted with for months, we are past the stage of trying to remedy the situation only by way of declarations. The declarations made in *Pett* and *D'Amico* have been ignored. More is required to maintain the credibility of the military judiciary and the courts martial military judges preside over.

[89] The Supreme Court of Canada has stated at paragraph 55 of *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 that "[a] meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied." These circumstances are that Sergeant Proulx was brought as an accused in court martial proceedings, a forum which should have been known to suffer from unresolved deficiencies as it pertains to his right to be tried by an independent and impartial tribunal. An appropriate remedy should have the effect of preventing the continuation of this situation, hence stop the proceedings from continuing.

The option of terminating the proceedings

[90] I have considered the submission of counsel for the respondent as to the option of imposing a termination of proceedings in lieu of a stay. The submission rested on an argument not made to me previously, to the effect that paragraph 4 of *Pett* stands to establish that

applications such as this one are considered pleas in bar of trial. If this application is a plea in bar of trial, then the remedy under QR&O paragraph 112. 24 (6) is a termination of proceedings, not a stay.

[91] I have concluded some time ago that I had erred by stating, at paragraph 4 of *Pett*, that an application seeking a finding that the Standing Court Martial is not an independent and impartial tribunal means that the court is without jurisdiction. Indeed, there are no jurisdictional factors at play in such a finding. The court martial or military judge ruling on a preliminary application under section 187 of the *NDA* is properly seized of the matter in accordance with the legislative and regulatory framework. No arguments are raised in such an application that would displace the presumption that the court or military judge has jurisdiction in the strict sense, for instance on the person or the offence. This is a different situation as was found in *R. v. Larouche*, 2014 CMAC 6, cited as authority for the proposition made at paragraph 4 of *Pett*, where the challenge pertained to the constitutional validity of the offence under which the accused was brought to trial before the court martial. If that offence is constitutionally invalid, as it was argued, then the charge does not disclose a service offence, a matter squarely within the realm of a plea in bar under QR&O subparagraph 112.24(1)(*e*).

[92] I had shared my views on this issue with counsel at the hearing in *Pett* and found general agreement with the proposition that the issue was one of jurisdiction. Consequently, I did not give it much thought until subsequent decisions on similar applications imposed stays of proceedings. I did reconsider my position in anticipation of the hearing in *Iredale*, but counsel seemed to agree that the application was made under QR&O subparagraph 112.05(5)(*e*) and not as a plea in bar of trial. Consequently, a stay was a possible remedy and I did not deem it necessary to discuss this issue in my written reasons in *Iredale*. I thank counsel for the respondent for pointing the matter to me at this hearing and I regret having ledhim and perhaps others astray by that erroneous statement.

[93] That clarification having been made, I am of the view that this is not a case where the option of terminating the proceedings will have less impact than a stay of proceedings. Indeed, the charges faced by Sergeant Proulx are strictly military and it has not been submitted that a trial before a civilian court would be an acceptable alternative. The distinction between staying and termination of proceedings makes no difference on appeal as they are both covered under the same ground at paragraph 230.1(*d*) of the *NDA* and may benefit from the same order for a new trial if the appeal is successful as per section 239.2 of the *NDA*. Imposing a termination of proceedings in this case would distinguish the remedy offered to Sergeant Proulx from the remedy offered to other accused persons who found themselves in the same circumstances in the last few months, including most recently Corporal Christmas. I am unable to see a sufficient justification to warrant a difference in treatment.

Conclusion

[94] I am concluding that the only appropriate remedy is to impose a stay of proceedings to stop the trial by General Court Martial from taking place. I am coming to this conclusion with the full knowledge that Sergeant Proulx is facing an objectively very serious charge of disobedience of a lawful command, punishable by imprisonment for life. Even if the

circumstances of the offence may appear to be minor, there are valid reasons not to tolerate any form of disobedience, even the most mundane, given that obedience is a habit that is essential to discipline.

[95] Despite these considerations, I have concluded that the interest in preserving judicial independence trumps any interest in continuing these proceedings. Sergeant Proulx should benefit from the same remedy that other accused persons in his situation have recently obtained. Considering imperatives of fairness and equality of treatment, it is in my view the only appropriate and just solution in the circumstances. One thing that the text of the Suspension Order reveals is that stays of proceedings inevitably capture the attention of the military hierarchy. We are in a situation once again where a reaction is required.

[96] The applicant's request for declarations that sections 12, 17, 18 and 60 of the *NDA* dealing with liability under the CSD and matters of control and administration be declared of no force or effect is dismissed, for the reasons mentioned above in my analysis.

[97] The applicant's request that MOOs and CDS orders passed under the authority of these provisions be declared to violate his right under paragraph 11(*d*) of the *Charter* is also dismissed. Indeed, once the law is understood and accepted as prohibiting military judges to being charged and dealt with by members of the executive for service offences, there is nothing to be gained in making such declaration.

[98] I have found that the Suspension Order of 15 September 2020, by referring to an organizational order which stipulates that members of the unit to which military judges belong will be disciplined, reveal an additional symptom constituting a separate breach of the applicant's right to be tried by an independent and impartial tribunal as guaranteed by paragraph 11(*d*) of the *Charter*. Yet, I do not see the need to make any further declaration to that effect for the same reason as applicable to other orders.

[99] I am aware of the decision of my colleague d'Auteuil M.J. in *Christmas* declaring that CFOO 3763 is 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. I agree that the provisions of that paragraph are not applicable to military judges: that is what the law set in *Pett* stands for. I do not see the need to make piecemeal declarations for every order which could be used inappropriately in relation of the law set in *Pett*. I believe doing so only invites authorities to apply "Band-Aid" solutions to individual symptoms instead of taking concrete steps to acknowledge the disease and its cure so that we can move ahead with reassurances to the public, accused persons and the reasonable, well-informed person that military judges have sufficient independence from the executive.

Closing

[100] In closing, I wish to comment on the invitation made to me by counsel representing the DMP to draft reasons which precisely outline what is required for courts martial to be held without the threat posed by applications of the kind in the future. I believe these reasons provide sufficient details to understand the law set in *Pett* and allow authorities to act accordingly. As a

judicial officer, I have to be careful to avoid offering any advice which may lead litigants to conclude that I am bound to certain outcomes in future cases.

[101] Counsel for the respondent suggests at paragraph 34 of his written submissions and orally that the CDS will act in a manner consistent with the outcome of the appeals at the CMAC. Yet, from his position at the top of a military hierarchy that is intimately involved in making any accused appear before a court martial, I would expect the CDS to know that courts martial decisions also apply pending appeal. That was demonstrated recently in the matter of *Duquette* where the Chief Justice of the CMAC confirmed that a reduction in rank imposed at trial is effective until reversed on appeal despite the inconvenience that it represents for an appellant who is convinced that he will be vindicated on appeal. If that is the law for convicted service personnel, it should be the law for those on the other side of the courtroom.

[102] Counsel for the respondent, inviting me to consider how the law should be applied between now and the outcome of the appeals, confirmed that there is currently no plan to charge any sitting military judge with a service offence before the issue of judicial independence is settled by the CMAC. However, paragraphs 146 and 147 of *Pett* envisage more. There are too many actors outside of the DMP for such a commitment to constitute reassurance that the law will be respected in the mind of a reasonable observer. We are beyond piecemeal solutions to fix symptoms. As stated above, the absence of a clear statement of acceptance of the law set in *Pett* to the effect that military judges cannot be charged for a service offence is problematic from a perception perspective given the current context of challenges to judicial independence. Without prejudice for the right of appeal of any party, it must be remembered that in the field of judicial independence, perceptions count. In refusing to impose the stay of proceedings as requested by the applicant in *Pett*, I implicitly rejected an argument to the effect that the October 2019 Order was the illustration of an apparent confrontation between the judiciary and military authorities. The perception may be different now. It should be clear that the military hierarchy may silently disagree but cannot disregard nor disrespect the law.

[103] As stated at the hearing, I fail to understand how the solution proposed in *Pett* is not seen as a small price to pay given the alternative of a court martial system that is brought to a halt. One reason may be a misplaced need to avoid perceptions that anyone is above the law. This view is illusory from an internal perspective: immunity of military judges from liability for service offences while in office would simply add them to the list of military office holders who cannot be charged and dealt with while in office, the first and most obvious being the CDS, as explained at paragraphs 117 to 131 in *Pett*. As for the principle of equality before the law from an external perspective, the philosophical underpinning found in the work of Dicey, mentioned at paragraph 48 of *Iredale*, reveals the great jurist's statement to the effect that everyone is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Of course that principle does not preclude citizens from not being subject to disciplinary jurisdiction for service offences and special tribunals such as courts martial.

[104] As stated in the last sentence of paragraph 146 in *Pett*, time has come for judicious choices to be made. It should be clear by now that the *Charter* rights of accused persons before courts martial are not negotiable. If one places on one side the need for members of the chain of command to be able to charge and deal with a military judge in the unlikely event that he or she

would have committed a service offence and on the other the need to maintain the confidence of the public that military justice can be administered for the discipline, efficiency and morale of members of the CAF, then the choice should not in my opinion be so difficult.

FOR ALL THESE REASONS, I:

[105] **GRANT** in part the application of Sergeant Proulx.

[106] **DECLARE** that the right of Sergeant Proulx under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal has been infringed.

[107] **DIRECT,** pursuant to subsection 24(1) of the *Charter*, that the proceedings of this General Court Martial in respect of Sergeant Proulx, convened on 6 November 2020, be stayed.

Dated this 24th day of November 2020, at the Asticou Centre, Gatineau, Quebec

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

Counsel:

Lieutenant-Commander J.E. Léveillé and Major B. Tremblay, Defence Counsel Services, Counsel for Sergeant S. Proulx, the Accused and Applicant

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

Annex A

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