COURT MARTIAL

Citation: *R. v. Cloutier*, 2020 CM 4013

Date: 20201209
Docket: 202009

Preliminary Proceedings

Asticou Centre
Gatineau, Quebec, Canada

Between:

Sergeant J.R.S. Cloutier, Applicant

- and -

Her Majesty the Queen, Respondent

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

DECISION ON AN APPLICATION FOR A STAY OF PROCEEDINGS

Introduction

[1] On 14 February 2020, three charges were preferred against Sergeant Cloutier: disgraceful conduct contrary to section 93 of the *National Defence Act* (*NDA*); conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*; and drunkenness contrary to section 97 of the *NDA*.

[2] The events giving rise to the charges allegedly took place at Support Base Valcartier on 28 November 2013. The accused is identified at the Master Corporal rank in the charge sheet and in subsequently drafted documents such as the convening order of this Standing Court Martial (SCM). I was told he was promoted to the rank of sergeant before being released from the Canadian Armed Forces (CAF) in September 2020 for medical reasons. He remains subject to the Code of Service Discipline (CSD) pursuant to subsection 60(2) of the *NDA*.

[3] In the first discussions for the purpose of scheduling a trial date, counsel for Sergeant Cloutier gave notice that he intended to submit a motion on the judicial

independence of military judges. In his written notice, the applicant requests a stay of proceedings order pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, because of the violation of his right to be tried by an independent and impartial tribunal as guaranteed under paragraph 11(*d*) of the *Charter*. He also requests that the Court declare sections 12, 17, 18 and 60 of the *NDA* and certain orders violate the constitutional principles of judicial independence and, consequently, are of no force or effect.

[4] The written notice in relation to this motion was filed on 9 October 2020, while Sergeant Cloutier's trial was to begin on 19 October 2020, at Canadian Forces Base (CFB) Valcartier. After this notice was presented, unexpected events and certain developments that modified the facts and the law regarding this motion occurred in succession, up until very recently. The hearing of the motion, originally scheduled for 16 October 2020, and then 12 November 2020, was finally heard on 3 and 4 December 2020, in anticipation of a trial that was to start less than five days later, on 14 December 2020, at CFB Bagotville.

Evidence

[5] The applicant's notice of motion and written submissions were entered into evidence as well as separate written submissions produced at my request on the issue of the application of the principle of judicial comity in relation to certain decisions rendered recently by other military judges. The respondent's written submissions dated 9 November 2020, constituting her reply to the applicant's arguments on both merits and judicial comity, were also entered into evidence.

[6] The documents appended to the parties' written submissions were entered into evidence at the request and with the consent of counsel. These include copies of the Chief of the Defence Staff (CDS) orders, Ministerial Organization Orders, Canadian Forces Organization Orders (CFOOs) and other documents that existed on 9 November 2020. In addition, copies of the charge sheet, convening order and re-enacted CFOO 3763 on the organization of the Office of the Chief Military Judge (CMJ), dated 18 November 2020, were produced. I also produced a copy of the draft oral decision rendered by d'Auteuil M.J. on 4 December 2020, in *R. v. Jacques*, 2020 CM 3010, just prior to the respondent's arguments and the applicant's reply were heard. These notes reflect the content of the oral decision at the time it was rendered and is the version used by counsel during the hearing. It was agreed that the final version that will be published could be worded differently.

[7] Finally, I took judicial notice of the facts and questions listed in sections 15 and 16 of the *Military Rules of Evidence* at the request and with the consent of the parties.

Background

Introduction

[8] This motion is consistent with a series of similar applications that started being submitted a little more than a year ago on the general issue of the independence of military judges in relation to the rights of the accused under paragraph 11(*d*) of the *Charter*. The issue began as a general concern, but the matter of the independence of military judges was refined by successive applicants as the facts and the law developed, following several decisions by three military judges who agreed to rule on the issue. The most recent decisions provide a complete description of the developments, which I do not feel are necessary to review in detail. Moreover, I gave a description of these events at paragraphs 4 to 15 in *R. v. Proulx*, 2020 CM 4012, rendered on 13 November 2020.

[9] Although I wish to avoid any repetition, I feel it is necessary to provide comments in a chronological summary of the major developments in the past year to make these reasons easier to understand. This summary is a condensed presentation of the concepts analyzed in the decisions mentioned and must in no way be interpreted as replacing these detailed analyses. This being said, the major developments regarding the issue of the independence of military judges occurred in the following phases:

(a) **Origins.** The written reasons delivered in *R. v. Pett*, 2020 CM 4002, on 10 January 2020, mark the analytical starting point of the subsequent applications. I concluded that the possibility that officers holding the position of military judge could be charged and dealt with under the disciplinary regime administered by the military hierarchy, a component of the executive branch, is likely to raise a reasonable apprehension of bias on an institutional level. This situation, considered a disease by the applicant in *Pett*, could, in my opinion, be sufficiently contained through the mechanisms of the Military Judges Inquiry Committee set out in sections 165.31 and 165.32 of the *NDA*. However, a CDS order dated 2 October 2019, part of which specifically targeted officers occupying the function of military judge as being subject to the disciplinary authority of a superior military officer designated for this purpose, constituted a symptom of the disease alleged by the applicant. I concluded that the existence of this order violated the principle of institutional impartiality and paragraphs 1(b) and 2 of that order were declared to be of no force or effect. The accused's application for a stay of proceedings was dismissed, leaving Master Corporal Pett very few options for remedying the violation of his rights. This was true because the issue was new, as explained in the conclusion, at paragraphs 146 and 147, which stated that reactions or a lack thereof to this decision could lead to one or more different remedies in the future. Six weeks after *Pett*, my colleague, Sukstorf M.J. came to the same conclusion and remedy in *R. v. D'Amico*, 2020 CM 2002.

(b) **Lack of reaction from the executive and consequences.** When court martial trials resumed in the summer of 2020 after the first wave of the COVID-19 health crisis, no action had been taken to remedy the

situation raised in *Pett* and *D'Amico*, in particular with regard to the revocation of the October 2019 CDS Order. This situation was criticized by my colleague, Sukstorf M.J., in an interim decision rendered 10 July 2020, in *R. v. Bourque*, 2020 CM 2008. At paragraph 40, she required an explanation for the lack of action. My colleague d'Auteuil M.J. considered that this lack of action should result in orders for a stay of proceedings in *R. v. Edwards*, 2020 CM 3006, and *R. v. Crépeau*, 2020 CM 3007, dated 14 August 2020, and in *R. v. Fontaine*, 2020 CM 3008, dated 10 September 2020. I reached the same conclusion and ordered a stay of proceedings in *R. v. Iredale*, 2020 CM 4011, on 11 September 2020. However, the applications made in some of these cases to have sections 12, 18 and 60 of the *NDA* declared of no force of effect were all dismissed. The Director of Military Prosecutions (DMP) appealed all the cases in which a stay of proceedings was ordered. The DMP representative in the present motion produced notices of appeal with his written arguments. The defence in *Crépeau* initiated a cross-appeal regarding the decision to not declare certain sections of the *NDA* to be of no force or effect.

(c) **First reaction of the executive and its effect.** On 15 September 2020, the CDS issued an order suspending the entire October 2019 order (suspension order), targeting the officers performing the function of military judge, among others, as being subject to the disciplinary authority of a superior military officer, pending the final decisions in the appeals in *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. The publication of this order, which included a six-paragraph preamble beginning with the word "Whereas", did not slow the influx of motions for a stay of proceedings and unconstitutionality based on alleged breaches related to the independence of military judges. In the first decision after the suspension order, rendered after a joint hearing of three cases on 7 and 8 October 2020, my colleague, Judge Sukstorf, dismissed these applications. In her reasons in *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012 (*MacPherson et al.*), delivered on 23 October 2020, she considered that the fact the 2 October 2019 order was, for the time being, no longer in force was sufficient for military judges to be seen as independent and impartial. In a second decision, rendered 10 November 2020, *R. v. Christmas*, 2020 CM 3009, my colleague, d'Auteuil M.J., concluded, to the contrary, that mentioning CFOO 3763 in the CDS suspension order was a violation of the right to be heard by an independent and impartial tribunal, considering that a reasonable and informed person would have the impression that the disciplinary regime that applies to all officers continued to apply to military judges. He declared that paragraph 9 of CFOO 3763 was of no force or effect. He ordered a stay of proceedings as a remedy for the violation of the right protected under paragraph 11(*d*) of the *Charter*. The third decision is *Proulx*, in which I concluded that the previous breaches involving the

impartiality of military judges were not corrected by the suspension order and that, to the contrary, it created additional difficulties in terms of the perception of military judges as an independent and impartial tribunal. I declared a stay of proceedings as the only remedy, with no declaration targeting any order or legislative provision. The decisions in *Christmas* and *Proulx* were also appealed by the DMP.

(d) **Second reaction of the executive and its effect.** On 18 November 2020, the CDS re-enacted CFOO 3763 without paragraph 9, which had been declared of no force or effect eight days earlier in *Christmas*. The hearing of a motion similar to the one in the present case in *Jacques* on 25 and 26 November reveals disagreement on the impact of the re-enactment. The issue seems to be whether military judges can still be charged and dealt with by members of the executive and whether the recent action on behalf of the CDS sends a sufficient signal for a reasonable and informed person to have the impression that the disciplinary regime that applies to officers does not apply to military judges pending a definitive resolution to the issue in appeal. In a decision rendered orally on 4 December 2020, in the middle of the hearing of the present motion, my colleague, d'Auteuil M.J., stated that he was of the view that the suspension of the CDS Order of October 2019 and the deletion of paragraph 9 of CFOO 3763 resulted in there no longer being an organizational instrument designating a commanding officer to deal with disciplinary issues with military judges under the disciplinary system that applies to CAF officers. In his opinion, military judges and courts martial they preside are therefore, for the time being, free of interference from the military hierarchy in matters of discipline. He concluded that a reasonable and informed person could now have the impression that the CDS had expressed recognition of the current applicable law, as established by the court martial. He therefore dismissed the motion.

Parties' arguments

The applicant

[10] In his written submissions, the applicant questions the independence and impartiality of military judges on two levels. First, he submits that the Office of the CMJ, the home unit of military judges in the CAF structure, does not enjoy a sufficient degree of independence in terms of administrative issues that affect its existence, its funding and the exercise of the judicial function to meet the necessary guarantees of institutional independence and impartiality. Second, he submits that military judges can still be charged and dealt with as officers under the disciplinary system administered by senior officer members of the executive, which means they cannot be seen as having the required level of judicial impartiality by a reasonable and informed person.

[11] Based on these arguments, the applicant is seeking a declaration that his right to be judged by an independent and impartial tribunal as required by paragraph 11(*d*) of the *Charter* was violated. To remedy this violation, the applicant is seeking a stay of proceedings from this standing court martial pursuant to subsection 24(1) of the *Charter*. The applicant is also seeking to have sections 12, 17, 18 and 60 of the *NDA* declared of no force or effect. Lastly, the applicant is arguing that a certain number of orders made under the authority conferred by sections 17 and 18 of the *NDA* violate his right to be judged by an independent and impartial tribunal.

[12] As for the recent events, which were clearly not addressed in the written arguments, the applicant submits that the re-enactment of CFOO 3763 without the paragraph declared to be of no force or effect in *Christmas* is not sufficient to dispel the negative perceptions regarding the impartiality of military judges that has been raised since *Pett* and again noted recently in *Proulx*.

The respondent

[13] The respondent submits that the current structure of the Office of the CMJ meets the requirements of judicial independence and institutional impartiality. With regard to military judges' being subject to the disciplinary regime administered by the military hierarchy, the respondent submits that the executive reacted appropriately following the decisions of the military judges by suspending the application of the October 2019 CDS order and by bringing into force a new version of CFOO 3763 that no longer includes the paragraph declared to be of no force or effect only a few days earlier in *Christmas*. In the respondent's opinion, this reaction by the executive sends the type of message that was requested in *Proulx*, considering there are no longer any symptoms of a lack of judicial impartiality that could go against decisions indicating that military judges are not subject to the disciplinary regime that applies to other officers when they perform their functions as military judge.

[14] With regard to the appropriate remedy, the respondent submits that any violation of paragraph 11(*d*) of the *Charter* could be remedied by a less drastic measure than a stay of proceedings.

Issues

What has already been decided

[15] Before making a statement on the issue in this application, it is relevant to briefly address the decisions already made in some of the applicant's requests, including less than one month ago in *Proulx*. In fact, counsel for the applicant chose not to address certain requests referred to in his application during his arguments, stating that he was aware that it would be difficult for me to reach different conclusions than those I reached in *Proulx* on those issues. Counsel for the applicant is correct. Several issues raised in his motion can be determined based on the previous decisions without conducting another analysis.

[16] With regard to the issue of the independence of the Office of the CMJ, I remain of the opinion, for the reasons stated at paragraphs 31 to 40 of *Proulx*, that it was not shown that the organizational, administrative and budgetary structure of the Office of the CMJ allows the executive to have any influence on the issues recognized as the minimum requirements of institutional judicial independence and impartiality. A reasonable and informed person would not perceive the manner in which the Office of the CMJ was created under the authority of the Minister of National Defence and organized by the CDS as problematic with regard to the independence and impartiality of military judges. On the contrary, as explained by d'Auteuil M.J. in *Jacques*, it is reassuring to know that such a unit was created with specific characteristics to adapt to the constitutional requirement related to judicial independence.

[17] For these reasons, the application to have sections 12, 17 and 18 of the *NDA* be declared of no force or effect must be dismissed, as must the application for a declaration regarding the Ministerial Organization Order and CFOO 3763 made under the authority conferred by these sections.

[18] With regard to the application respecting section 60 of the *NDA* and certain organizational orders that allow military judges to be charged and dealt with as members of a group or category of persons, it was determined in *Pett* that the fact military judges are subject to the CSD and to certain other general orders does not cause any problems in itself, insofar as they are not targeted specifically and it is understood and clearly accepted that military judges can no longer be charged under the disciplinary regime administered by members of the military hierarchy. Consequently, the application regarding the CDS Order of 14 June 2019, designating commanding officers for officers and other military members from National Defence Headquarters (NDHQ) is dismissed. Furthermore, for the reasons set out in paragraphs 47 and 48 of *Proulx*, the application to have section 60 of the *NDA* declared to be of no force or effect is dismissed. Finally, in accordance with the decision in *Proulx* and in light of the recent changes to CFOO 3763, no declaration is required with regard to the suspension order dated 15 September 2020.

What is left to be decided

[19] This application is particularly challenging in light of the recent decision of d'Auteuil M.J. in *Jacques*, which analyzes the impact of the re-enactment of CFOO 3763 on 18 November 2020. Before analyzing the two conclusions at the heart of this decision, I will step back to address the decision in *Pett* and subsequent decisions by explaining the points on which the military judges unanimously agree. I will then review *Proulx*, which is an omnipresent reference point in *Jacques*, while discussing the points of convergence and divergence with the decisions from the same period. I will then discuss *Jacques*, in particular its premise and the resulting conclusions, noting why I might not agree with one or the other. I will determine whether I am bound by the findings and resolution of the motion in *Jacques*, which will allow me to rule on

whether Sergeant Cloutier's rights under paragraph 11(*d*) of the *Charter* were violated. If so, I will then be required to decide on the appropriate remedy in the circumstances.

Analysis

Judicial unanimity on principles developed in Pett

[20] The legal principle developed in *Pett* forms the basis for subsequent decisions on the subject, including *Proulx* and *Jacques*. According to this principle, despite the legislative, regulatory and organizational framework that allows officers performing the functions of a military judge to be charged and dealt with by members of the executive under the disciplinary regime applicable to officers and administered by the military hierarchy, they are exempt from this regime because they are subject to the CSD only with regard to the disciplinary mechanism administered by the judicial actors of the Military Judges Inquiry Committee.

[21] The development of this principle, with no legislative statement specifically recognizing the priority of the judicial disciplinary system of the Military Judges Inquiry Committee over the disciplinary process that applies to all officers, required a novel interpretation of the *NDA*. The interpretation relied on in response to an application alleging the incompatibility of the legislative framework with the constitutional principle of judicial independence and impartiality recognized the possibility that the legislation could be interpreted as being constitutional even though it could be used in an unconstitutional manner. This principle developed in *Pett* was substantially accepted and applied by the three military judges who have rendered decisions on the issue of the independence of military judges since then.

[22] It must be recalled, however, that the acceptance of this principle was far from assured at the time the reasons in *Pett* were rendered in January 2020. Not only was it novel law, but it was contrary to the understanding of the law publicly demonstrated by two actors playing a fundamental role in all charges and prosecutions against a military judge under the disciplinary process applicable to officers. First, in an October 2019 order, the CDS specifically targeted military judges, who were assigned a commanding officer for disciplinary purposes. Second, at that time, the DMP was before the Federal Court in a judicial review to attempt to reactivate prosecutions against the Chief Military Judge that were at a stalemate after the refusal to assign a judge to preside over the trial. Although the CDS order expressing a position that was contrary to the law was declared of no force or effect in *Pett*, I feel it is clear that only an acceptance of the law by the executive, including the DMP, would provide a guarantee to the public and those who appear in courts martial in the future that they would be judged before an independent and impartial tribunal. This explains the conclusion in *Pett* at paragraphs 146 and 147.

[23] Therefore, the law had to be not only promulgated in *Pett* to protect the rights of the accused under paragraph 11(*d*) of the *Charter*, but also accepted by the executive and the DMP. The DMP's resignation to abandon prosecution of the Chief Military

Judge on 11 March 2020, after the his application for judicial review was dismissed by Martineau J. in *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330 (*DMP v. OCMJ*), does not constitute such an acceptance; the litigation and its conclusion were not based on a legal impossibility to prosecute a military judge before a court martial, although the practical difficulties of such a prosecution and certain conclusions stated in *Pett* were considered by the Federal Court.

[24] To a certain extent, *Pett* and subsequent decisions may be seen as a compromise. When faced with an application by an accused alleging an incompatibility between the executive duties of an officer and the judicial duties of a military judge, the solution adopted decrees the constitutionality of the legislative, regulatory and organizational framework in force, despite the fact that it allows, in theory, for military judges to be subject to the disciplinary process administered by the executive. In exchange, it is expected that the executive will follow up on decisions by accepting the interpretation decreed by the military judiciary that renders such an application illegal in practice, starting by rescinding the October 2019 order. This application of the decision required minimal effort, in particular when compared to a legislative amendment.

[25] In addition to unanimously accepting the principle of immunity of military judges regarding the disciplinary process applicable to officers, all the military judges who ruled on the issue, in my opinion, also adopted the principle that the executive had to accept the wording of this law. Paragraphs 146 and 147 of *Pett* were largely cited by my colleagues in support of this. They added their own comments criticizing the lack of reaction by the executive, thereby indicating a general acceptance that the onus was on the executive to act after *Pett*. Moreover, this lack of action led to a stay of proceedings in five cases decided prior to the promulgation of the suspension order.

[26] Following this, the situation changed. Considering that the executive reacted, the issue then became whether this reaction was sufficient. This is when tensions arose between the military judges. That being said, there has always been unanimity that the protection of the military judges' impartiality requires recognition by the executive. In my opinion, without this recognition, a reasonable and informed person would have a reasonable apprehension of bias from the military judges and the courts martial they preside.

The Proulx decision

[27] The written reasons delivered on 24 November 2020, in *Proulx* were purposefully in line with the *Pett* decision. I believed that it was important to demonstrate that *Pett* had a broader scope than the issue of the legality of the October 2019 CDS order, an order that was merely a symptom of the disease afflicting the independence and impartiality of military judges, namely the lack of institutional impartiality vis-à-vis the executive branch. In fact, *Pett* recognized that the legislative, regulatory and organizational framework allows officers holding positions as military judges to be charged and dealt with by actors of the executive branch. This raises issues

of judicial independence, an essential prerequisite for the public's perception of impartiality in relation to a court, as explained in paragraphs 44 to 48 of *Pett*.

[28] Noting that this situation persists, I reiterated in *Proulx* that it was not sufficient that this possibility be precluded as a matter of law by the *Pett* decision. Protecting the impartiality of military judges requires that this right be recognized by the executive so that this principle continues to be effective beyond its initial expression by the judiciary. The CDS Order of October 2019 was declared of no force or effect in *Pett*, *D'Amico*, *Edwards*, *Crépeau*, *Fontaine* and *Iredale* precisely because it not only did not recognize this right, but expressly denied it. The executive reacted with the suspension order signed by the CDS.

[29] My colleague, Sukstorf M.J., was the first to have to assess the impact of the suspension order dated 15 September 2020. She found that the CDS order of October 2019 was no longer in effect for the time being. Accordingly, she determined that in the context of the law established in *Pett* limiting the extent to which military judges are subject to the disciplinary mechanism administered by the judicial actors of the Inquiry Committee established by the CSD, sufficient guarantees had been provided that military judges could now be perceived as independent and impartial. However, in *Proulx*, I found that, in my view, she reached this conclusion without questioning the message conveyed by the content of the suspension order, specifically whether it constituted recognition of the law established in *Pett*.

[30] I also referred to the subsequent decision of d'Auteuil M.J. in *Christmas*, which analyzed the content of the suspension order. He concluded at paragraph 73 that the reference to paragraph 9 of CFOO 3763 reveals that the CDS makes it possible to use the disciplinary system applicable to officers and administered by the executive to the detriment of the disciplinary system administered by the judicial authorities provided for by Parliament. Noting that this impact was the same as that generated by the now suspended October 2019 order, he found a similar violation of the accused's right under paragraph 11(*d*) of the *Charter*. He chose to declare paragraph 9 of the CFOO inoperative, also ordering a stay of proceedings as a remedy.

[31] In comparing *Christmas* with *Proulx*, I note that d'Auteuil M.J.'s analysis, like mine, was based on the content of the suspension order, and that he concurred with me that the reference to the CFOO gave the impression that the disciplinary regime applicable to officers continued to apply to military judges, a conclusion inconsistent with the law established in *Pett.* However, he chose to emphasize the practical impact of the suspension order by declaring inoperative a paragraph of CFOO 3763 which, in his view, made it possible for that disciplinary regime to apply to military judges. For my part, I concluded that it was not so much the appearance of another symptom, but above all the lack of recognition in the suspension order dated 15 September 2020 of the state of the law established in *Pett* that caused the violation of the principle of judicial impartiality. In other words, I concluded that there had been a failure to address the disease afflicting military judges, namely the lack of institutional impartiality that can be perceived by a reasonable and informed person.

[32] Having recognized that Sergeant Proulx's rights under paragraph 11(*d*) of the *Charter* to a trial before an independent and impartial tribunal had been violated, I imposed the only remedy I believed to be effective in the circumstances, namely, a stay of proceedings.

Re-enactment of CFOO 3763

[33] I issued my decision in *Proulx* on 13 November 2020, although the written reasons were provided a few days later. As noted above, CFOO 3763 was re-enacted on behalf of the CDS on 18 November 2020. The only change from the previous version of 27 February 2008 is that the order now has 11 paragraphs instead of 12, considering that paragraph 9, which was declared inoperative in the *Christmas* decision, no longer appears in it. Paragraphs that refer to outdated concepts were re-enacted. For example, reference is made to disciplinary courts martial and special general courts martial that have ceased to exist since 17 July 2008, more than 12 years ago. In all likelihood, the re-enactment of the CFOO was done in haste in response to the *Christmas* decision dated 10 November 2020.

[34] The question that arises after 18 November 2020, according to the principles accepted by all military judges since *Pett,* is whether the *de facto* elimination of paragraph 9 of CFOO 3763 dated 27 February 2008 demonstrates the executive's acceptance of the law established in *Pett* to the effect that the extent to which serving military judges are subject to the CSD is limited to the disciplinary mechanism administered by the judicial actors of the Military Judges Inquiry Committee.

[35] An analysis of this issue on the basis of my finding in *Proulx* only allows me to conclude that the new fact that has arisen since that decision, namely the re-enactment of CFOO 3763, does not in any way demonstrate that the executive accepts the law set out in *Pett*. The re-enactment is merely an acknowledgement of the decision of d'Auteuil M.J. dated 10 November 2020 declaring paragraph 9 in the previous version of that order inoperative. It is the same type of recognition contained in the suspension order dated 15 September 2020, which sets out, in the paragraphs of its preamble beginning with the word "Whereas", a series of legal facts describing the decisions that the judges have rendered or are expected to render. These findings were not recognized as sufficient in the *Proulx* decision, and there is no reason to change this conclusion given that the suspension order has not been modified.

[36] I recognize at the outset that there could be two ways of interpreting the English phrase "acknowledgement of the law" used in my decisions in *Pett* and *Proulx* if one relies on the definition of the word "acknowledge" in the *Concise Oxford English Dictionary*, which reads simply as follows: "accept or admit the existence or truth of" [emphasis added]. This definition suggests the existence of two levels of acknowledgement or recognition. The first level consists of admitting the existence of something. This is exactly what happens with a simple admission of the existence of a judicial decision. This is obviously a different concept from admitting the truth of

something. This second level requires not only acknowledging that a judicial decision has been rendered, but also admitting that such a decision lays down binding rules of law, which must be followed.

[37] It seems obvious to me from reading the entire decision in *Proulx*, especially the conclusion in paragraph 68, that it is to this second level that I refer when I mention the need for an acknowledgement of the law. Acknowledging that the judges have made certain decisions is quite different from admitting the validity of the law laid down and its binding effect, even if only pending an appellate decision to the contrary. This second option is the only one that may be able to reassure the public and the accused that it is now impossible for the executive to use the disciplinary system administered by the military hierarchy to charge and prosecute serving military judges, to the detriment of the disciplinary system administered by the judicial authorities provided for by Parliament. This is the only interpretation that can placate an informed and reasonable observer that military judges have the institutional impartiality required to constitute a tribunal that is independent and impartial, at least pending a decision to the contrary by a court of appeal.

[38] The conclusion I would have reached on this application on the basis of *Proulx* would therefore be that the change made by the re-enactment of CFOO 3763 is insufficient to conclude that there was no violation of Sergeant Cloutier's right to a trial before an independent and impartial tribunal. The analysis of my colleague, d'Auteuil M.J., and his decision in *Jacques* are not consistent with this conclusion. Despite my efforts, I am unable to reconcile my colleague's conclusions with those I believe should have been rendered. I must therefore respectfully explain why.

The Jacques decision

Introduction

[39] An analysis of the decision of my colleague, d'Auteuil M.J., in the *Jacques* decision reveals that the two pillars on which that decision rests are, respectfully, wrong. First, with respect to the premise stated at the outset of the analysis, I believe it is incorrect to state that the suspension of the CDS Order of October 2019 and the deletion of paragraph 9 of CFOO 3763 ensure that officers who serve as military judges are now free from interference by the military hierarchy in disciplinary matters. In my view, military judges are still liable to be charged and dealt with under the disciplinary regime applicable to officers of the CAF. Furthermore, I do not agree with the conclusion that, as a result of the re-enactment of CFOO 3763, a reasonable and informed person can now perceive that the CDS has acknowledged the applicable law. This conclusion is based on a retroactive imputation of intent in connection with the suspension order of 15 September 2020, to which I unfortunately cannot subscribe. I will address these two issues in succession.

Are military judges truly immune from executive interference?

Premise

[40] The introduction of the analysis in *Jacques* sets out what constitutes the premise of the reasons on the specific issues that are subsequently addressed. Paragraph 54 of the draft decision reads as follows:

> [TRANSLATION]
>
> As suggested by the respondent, following the suspension of the CDS Order dated 2 October 2019 and the deletion of paragraph 9 of CFOO 3763, it appears that there is no longer any other legal instrument providing for the appointment of a commanding officer in respect of the CAF officer holding the office of military judge to deal with any disciplinary matter in respect of him or her under the CSD regime in respect of a service offence. In my view, this has the effect of shielding military judges, and the courts martial they preside over, from any interference by the military hierarchy in disciplinary matters. [Emphasis added.]

[41] In reality, military judges are not at all immune from discipline. They can be charged and dealt with despite the suspension of the CDS Order of October 2019 and the deletion of paragraph 9 of CFOO 3763, in two ways.

A chain of command for military judges may be established at any time

[42] First, even if we accept that there is no document promulgating a chain of command linking military judges to a commander and a referral authority at this time, this situation does not protect military judges from anything, given that such a chain can be created in a very short period of time.

[43] Indeed, the suspension of the CDS order of October 2019 by the order of 15 September 2020 and the removal of former paragraph 9 of CFOO 3763 in the re-enactment of this order on 18 November 2020 were the result of initiatives promulgated respectively by and on behalf of the CDS, and therefore of the military hierarchy.

[44] Neither of these actions was accompanied by a statement that they were carried out to comply with the law established in *Pett*. Without a clear statement from the DMP and the CDS that the law established in *Pett* has been accepted, there is nothing to prevent an order being promulgated by or on behalf of the CDS conferring new authority to charge and prosecute a military judge through the disciplinary system applicable to other officers. Such promulgation has occurred relatively recently: the CDS signed an order on 19 January 2018, designating the Chief of Programme as the commanding officer for all disciplinary matters in respect of a military judge. Six days later, the Chief Military Judge was charged by a military police officer of the Canadian Forces National Investigation Service (NIS). On 30 January 2018, the Chief of Programme, as commanding officer, forwarded his recommendations to the referral authority. The referral authority submitted the file to the DMP on 5 February 2018. Relying on the factual background to these events, as described by Martineau J. at paragraphs 62 to 64 of *DMP v. OCMJ*, I have no difficulty inferring that the purpose of the order dated 19 January 2018 was to consolidate a direct line of authority clearly

allowing the Chief Military Judge to be charged and dealt with. This was explained by my colleague Sukstorf M.J. in paragraph 67 of *D'Amico*, in which she noted that the order dated 19 January 2018 was merely the earlier version of the order dated 2 October 2019 which all military judges have declared inoperative since *Pett*.

[45] I must therefore conclude that a direct chain of command linking military judges to a commanding officer and a referral authority can be created in a very short period of time simply by using existing precedents. In 2018, only 17 days had elapsed between the promulgation of the order assigning a commanding officer to the military judges and the referral of charges against the Chief Military Judge to the DMP for prosecution at court martial.

[46] In coming to this conclusion, I make no negative judgement on the good faith of the actors involved. That said, the presumption of good faith alone cannot protect the fundamental rights of the accused, as explained by my colleague Sukstorf M.J. in paragraphs 36 to 39 of *D'Amico*, referring to the decision of the Supreme Court of Canada in *R. v. Nur*, [2015] 1 S.C.R. 773, especially at paragraph 86. This is especially true since the DMP was careful to produce the Notices of Appeal with the written arguments in response to the recent motions and the CDS mentioned in the suspension order dated September 15, 2020 that the *Edwards*, *Crépeau* and *Fontaine* decisions were being appealed. There is no doubt that these appeals were legitimately initiated in good faith, except that the fact that key players felt the need to draw attention to the appeals reveals a reluctance on their part to accept the law established in *Pett*. However, this choice needs to be balanced with a clear statement from them that such is not the case, without compromising the use of existing judicial mechanisms to make their point at the appropriate time.

[47] Considering the circumstances I have just described, particularly the ease of designating authorities to deal with charges against a military judge, I have difficulty accepting that a reasonable and informed person could be satisfied that the abolition of a chain of command linking military judges to a commanding officer and a referral authority provides, in and of itself, sufficient assurance that military judges are free from interference by the executive in disciplinary matters.

Even without a chain of command, military judges can be charged and dealt with

[48] The second reason why military judges are not immune from discipline is that even without the promulgation of a direct chain of command linking military judges to a commanding officer and a referral authority, military judges may still be charged by an NIS military police officer and dealt with through the chain of command where they are located.

[49] Indeed, although paragraph 9 of the former CFOO 3763 no longer appears in the new version, the absence of a paragraph dealing with the manner in which discipline may be administered with respect to the staff of the Office of the CMJ does not affect the authority conferred on office holders for disciplinary purposes in the CSD and the

Queen's Regulations and Orders for the Canadian Forces (QR&O). The CFOO is a strictly organizational instrument, as specified in paragraph 2 thereof. It covers the staff of the Office of the CMJ, which includes military personnel who are not military judges.

[50] One of the fundamental authorities given to office holders in the 1997–1999 military law reform was the authority given to military police officers of the NIS, an agency outside the immediate chain of command of an accused, to lay charges under the CSD. As noted at paragraph 61 of *DMP v. OCMJ*, the NIS is under the command of the Canadian Forces Provost Marshal, who in turn operates under the general direction of the Vice Chief of the Defence Staff, pursuant to sections 18.3 and 18.5 of the *NDA*. As explained in paragraphs 23 and 26 of *Pett*, members of this unit of 65 to 70 police officers, who regularly testify in courts martial, have the authority to lay charges against persons subject to the CSD as set out in QR&O 107.02(*c*). Considering that military judges are subject to the CSD, NIS military police officers may lay charges against them just as much today as in 2018 when charges were laid by the NIS against Dutil C.M.J., notwithstanding the suspension of the CDS Order of October 2019 and the removal of paragraph 9 of the former version of CFOO 3763.

[51] For greater certainty, an NIS military police officer who wishes to lay charges against a military judge is required to obtain prior legal advice from DMP legal counsel, as explained at paragraph 26 of *Pett*. The appropriateness of whether or not a charge should be laid in the circumstances is one of the issues addressed in that legal opinion, as set out in QR&O 107.03(2). The assurance that the DMP and DMP staff accept the law set out in *Pett* that officers serving as military judges are exempt from the disciplinary system applicable to other officers is, in my view, the only guarantee that a military judge will be immune from service charges laid by a member of the executive branch of the military hierarchy.

[52] The impact of charges laid against a military judge is not insignificant. As explained in paragraph 48 of *Pett* and illustrated with the example of charges against the Chief Military Judge in paragraphs 67 and 71 of *D'Amico*, the laying of charges against a military judge will undoubtedly have the effect of isolating that judge from his or her judicial duties. According to what d'Auteuil M.J. stated at paragraphs 46 and 48 of the *Edwards* decision, the laying of such charges under the disciplinary regime applicable to all officers sets in motion a disciplinary process proscribed by Parliament, which in the *NDA* gave precedence to the disciplinary process of the Military Judges Inquiry Committee.

[53] The impact of the actions of an NIS military police officer could be limited if, as noted by d'Auteuil M.J. in the paragraph cited above, the absence of an instrument providing for the appointment of a commanding officer in respect of military judges meant that any service offences against them could not be further processed and prosecuted. However, this is not the case.

[54] According to QR&O 107.09(1)(*a*), a NIS Military police officer who lays a charge against a military judge has a choice as to which officer to refer the charge to. One such choice would be to refer the charge to the commanding officer of the base, unit or element in which the accused was present at the time the charge was laid. The job of military judges is to travel to military bases, often even within the accused's unit, to preside over court martial trials. It would therefore be very easy for a police officer to serve the military judge at such a location, even easier than doing the same thing in the National Capital Region. Once a commanding officer receives the charge, he or she has two options: proceed with the charge or decide not to proceed. In the unlikely event that the commanding officer decides not to proceed with a charge laid by an NIS military police officer against a military judge present at his or her base, unit or element, he or she must provide written reasons for that decision to the police officer and his or her superior, in accordance with QR&O 107.12(1) and (2). This refusal does not preclude the subsequent prosecution of an accused, as the NIS military police officer may refer the matter directly to the referral authority pursuant to QR&O 107.12(3). In the more plausible event that the commanding officer decides to proceed, QR&O 109.03(1) to (3) provide that he or she must simply refer the charge by letter to a referral authority, normally the officer who is his or her immediate superior in disciplinary matters. The referral authority therefore does not need to be in a direct reporting chain with the accused military judge. The referral authority has no decision to make; he or she must refer charges to the DMP under section 164.2 of the *NDA* but may make recommendations.

[55] This technical demonstration of the potential use of the regulatory framework demonstrates that NIS military police officers can still lay charges against military judges and have those charges referred to the DMP for possible prosecution at court martial. Such a course of action is fully consistent with the *NDA* and its regulations and, in the absence of an acceptance of the law established in *Pett*, will no doubt be approved by the legal advisers involved. The legal advisers involved are members of the executive. Their involvement and the acceptance or rejection of their advice do not affect my conclusion as to judicial impartiality. In the face of this situation, I cannot see how a reasonable and informed person can be fully reassured that military judges are immune from any interference by the executive in disciplinary matters.

Conclusion

[56] I must therefore respectfully conclude that the premise stated in the introduction to the analysis in *Jacques is* not entirely accurate. The suspension and removal of certain instruments designating a commanding officer for disciplinary purposes do not have the effect of protecting military judges from interference by the military hierarchy.

[57] Although today the authority of the CDS Order of October 2019 and the secondary authority that was found in paragraph 9 of CFOO 3763 are indeed suspended and deleted respectively, this is merely an order from the CDS to re-establish a chain of command that allows military judges to be charged and dealt with. In addition, the

current regulatory mechanisms for laying and referring charges allow an NIS military police officer to charge a military judge and refer those charges to the DMP.

[58] In my view, therefore, military judges are not currently immune from discipline. They can be charged and dealt with in accordance with the QR&O under the disciplinary regime applicable to officers without regard to the judicial disciplinary process of the Military Judges Inquiry Committee. The military judges unanimously recognized that this situation constitutes a violation of the principle of judicial impartiality. I do not see how a reasonable and informed observer could perceive such a situation to be consistent with the principle of institutional judicial impartiality without the DMP and the CDS making it clear that what is permitted in the current legislative and regulatory context will not be tolerated as a result of the acceptance of the law set out in *Pett*.

Impact of CDS suspension order on judicial independence

Jacques on interpretation of suspension order

[59] Having established the premise in the introduction, the analysis in the *Jacques* decision deals with the content of the CDS's suspension order of 15 September 2020, referring from the outset to the analysis in *Proulx*. My colleague is of the opinion that the manner in which the CDS formulated the language in the preamble to the suspension order may have caused confusion. He agreed with the statement in *Proulx* to the effect that what matters is the impact of such language on the perception that a reasonable and well-informed person would have of the judicial independence of military judges.

[60] On this question of the perception one may have of the suspension order, it should be noted that there is a strong convergence between *Jacques* and *Proulx*. Paragraph 78 of the draft *Jacques* decision reads as follows:

> [TRANSLATION]
>
> It is true that the language of the preamble to the CDS's suspension order may lead a reasonable and informed person to believe that there is some reluctance on the part of the military hierarchy to acknowledge the law currently applicable to the application of a specific mechanism to review the conduct of CAF officers serving as military judges. It is true that it was only nine months after the court martial rendered its first decision on the issue, and after it ordered a stay of proceedings in four trials over a one-month period, and without reference to the applicable law in force, that the decision to suspend the CDS Order dated 2 October 2019 appointing a commanding officer for military judges regarding any disciplinary matter was communicated.

[61] My colleague then went on to point out that the interpretation of the suspension order provided in *Proulx* obviously did not take into account the subsequent deletion of paragraph 9 of CFOO 3763. Reiterating the premise that the re-enactment of CFOO 3763 on 18 November 2020 had the effect of protecting military judges from any interference by the military hierarchy in disciplinary matters, my colleague added that

this change meant that the language of the CDS's suspension order now had to be analyzed in this new context. The draft *Jacques* decision states the following:

> [TRANSLATION]
>
> In the present context, the reference to CFOO 3763 in the CDS suspension order must now be completely ignored by that reasonable person;
>
> With the decision to delete paragraph 9 from CFOO 3763, a reasonable and informed person can now perceive that the CDS has expressly acknowledged the applicable law as established by the Court Martial;
>
> By removing any opportunity for the military hierarchy to interfere with the management of discipline in respect of the conduct of military judges under the CSD, the CDS acted unequivocally, thereby negating any perception on the part of a reasonable and informed person with regards to any reluctance on the part of the military hierarchy to respect the constitutional principle of independence and impartiality that military judges must enjoy for the benefit of those subject to the CSD;
>
> Analyzing the issue of the duration of the suspension of the CDS Order in this modified context, it is clear that for a reasonable and informed person, the decision to suspend rather than simply rescind the CDS Order dated 2 October 2019 is a perfectly acceptable prospect, provided that the executive authority recognizes by its actions the law currently applicable while legitimately using existing judicial mechanisms to make its point.

Reservations regarding impact of presumed immunity of military judges

[62] As stated above, I disagree with the premise in *Jacques* that the military hierarchy, as a result of its actions, is no longer able interfere in the administration of discipline with respect to the conduct of military judges. My disagreement, for the reasons stated and demonstrated above, compels me to question any claim that a reasonable, well-informed person would view the actions as an acknowledgement of the law set by military judges in *Pett* and followed since. On the contrary, on the basis of recent public events and my reading of the articles of the QR&O, which are widely available to anyone interested in learning about the military, I have concluded that military judges are not immune from executive interference.

[63] As explained above in the remarks regarding *Proulx*, the executive's recent actions to suspend the October 2019 CDS Order and delete paragraph 9 of CFOO 3763 simply acknowledge the statements of law expressed by military judges, without acknowledging that the law set by military judges creates an obligation for the executive to act or refrain from acting in a certain manner. Only an acknowledgement of the law established in *Pett*, to the effect that military judges cannot be charged and dealt with by members of the executive under the disciplinary regime applicable to officers, will fulfill the constitutional principle of independence and impartiality that military judges must enjoy for the benefit of those subject to the CSD.

[64] As stated in *Proulx* and agreed upon by the military judges who had previously condemned the lack of action, the onus was on the executive to act. I am of the opinion that a clear acknowledgement of the law established in *Pett* is required. Action

indicating that the executive is simply taking note of judicial decisions but not indicating that these decisions bind the executive in its actions as a statement of binding law is not sufficient. With all due respect for the contrary opinion, I see no clear action to this effect in the 15 September 2020 suspension order or in the deletion of paragraph 9 of CFOO 3763.

Reservations regarding interpretation of suspension order

[65] Having clarified my view with respect to the premise in *Jacques*, I must also respectfully express my unease with the reasoning leading to the conclusion that the suspension order must now be interpreted by retroactively deeming the presumed intent behind the deletion of paragraph 9 of CFOO 3763 on 18 November 2020 to also be the presumed intent behind the issuing of the suspension order by the CDS more than a month earlier, on 15 September 2020.

[66] Granted, what counts is the effect that the language of the suspension order would have on a reasonable, well-informed person's perception of the judicial impartiality of military judges; however, the line between that effect and the presumption of intent is a fine one, as explained in paragraph 57 of *Proulx*. That said, I fail to see how the 15 September 2020 order, in particular the perception it creates, can be analyzed on the basis of the order to re-enact the CFOO, which was not made until two months later, on 18 November 2020.

[67] Indeed, I do not see how a reasonable person could totally disregard the reference to CFOO 3763 in the CDS's suspension order by reason of the subsequent deletion of paragraph 9, as suggested in *Jacques*, given the following:

(a) A reasonable person reading the 15 September 2020 suspension order to assess its effect on the judicial impartiality of military judges will see the reference to CFOO 3763 and will search for the version of the CFOO in effect on 15 September 2020. The suspension order has not been amended.

(b) I find it difficult to deem the intent behind the suspension order, namely to recognize the applicable law, to also be the intent behind the re-enacted CFOO 3763. The CFOO is issued by the Chief of Programme (identified by the abbreviation "C Prog") acting on behalf of the CDS, as specified in the final paragraph. This is, of course, a typical exercise of a power conferred on the CDS by another authority as provided for in articles 1.13 to 1.16 of the QR&O. That said, there is no evidence that the CDS personally contributed to or even saw the amended CFOO, whereas the suspension order bears his signature.

(c) The unrelated nature of these two documents is also apparent when one considers their purpose. The purpose of the suspension order is to suspend the application of an order establishing a chain of command that

enables military judges to be dealt with under the disciplinary regime applicable to officers, while the effect of re-enacting CFOO 3763 without paragraph 9 is to remove a general reporting chain that applies to all personnel in the Office of the CMJ, similar to the disciplinary reporting chains created in relation to other members of NDHQ staff. No judicial decision has been rendered regarding any exemption of military personnel from the Office of the CMJ in connection with the CSD. How can it be presumed that the decision to re-enact CFOO 3763 without paragraph 9 represents a clear acknowledgement of a right established exclusively for military judges?

(d) As stated at paragraph 61 of *Proulx*, the fact that the October 2019 order was not rescinded, as required by the military judges, but only suspended is not determinative in itself. However, it is a factor that would influence the perception of a reasonable, well-informed person. The decision to suspend rather than rescind the October 2019 order, which has repeatedly been declared invalid, puts the order on hold and allows it to be reactivated without further formality when the conditions for lifting the suspension are met, that is, once the appeals are finally disposed of, regardless of the outcome. This is clear from the language of the suspension order itself; it is not the result of confusing wording. As explained in *Proulx*, I do not believe that this is an expression of the CDS's intent not to act if the appeals are not allowed. Nor is it an acknowledgement of the law established in *Pett*. Rather, the decision to suspend, together with the general wording of the preamble to the 15 September 2020 suspension order, sends a message that the executive expects that the appeals will be allowed and that the status quo will return. I see nothing in the subsequent re-enactment of CFOO 3763 on 18 November 2020 without paragraph 9 that would change this perception. I find it difficult to believe that this suspension, by definition temporary, would remove all doubt in the mind of an informed and reasonable observer as to whether the law established in *Pett* is accepted as authoritative.

[68] I believe that my unease lies in the fact that I am, respectfully, unable to understand how the assessment of the suspension order's effect can be influenced by a document issued on a later date, by a different authority, for a different purpose and for different reasons. Therefore, having read the analysis in *Jacques*, I am unable to reconsider my conclusions in *Proulx* on how the language of the suspension order would affect a reasonable, well-informed person's perception of the judicial impartiality of military judges.

Conclusion

[69] I am of the opinion that, unfortunately, there are significant errors in *Jacques*. With respect, I believe that the path to these errors began with the conclusion of the

analysis in *Christmas*, which departs from the conclusions in *Pett* that it is futile to declare general orders to be of no force or effect if they can capture military judges simply as members of a targeted group. By identifying an additional symptom, as was done a few days later in *Proulx*, *Christmas* responded with a declaration of invalidity rather than focusing on the disease affecting courts martial, namely the continued subjection of military judges to the disciplinary regime administered by the military hierarchy. The decision to issue a declaration of invalidity with respect to paragraph 9 of CFOO 3763 gave the executive an opportunity simply to delete that paragraph and re-enact the CFOO, without any specific admission as to whether the law set out in *Pett* applies to the actions of the executive. I can therefore understand how difficult it was to backpedal afterwards, considering that it would have basically required identifying a new violation that had not been described in *Christmas* or other earlier decisions.

[70] I have refused to limit myself in that way and can therefore reiterate the position I believe I have taken rather consistently in *Pett*, and later in *Iredale* and *Proulx*.

[71] I stated at paragraph 130 of *Pett* that the objective underlying the DMP's argument in his written response that military judges are not above the law is rather to ensure that military judges remain subject to the disciplinary process applicable to CAF officers, which the military hierarchy administers under the guidance and effective control of the Office of the Judge Advocate General. Since *Pett*, prosecutors and legal advisers advising the executive have noticeably minimized concessions and admissions in relation to the law set out in *Pett*, to ensure that military judges do not obstruct the continuation of court martial trials, pending a return to the *status quo ante* once the appeal process ends. This position is not unlawful, and I have no doubt that it is taken with good intentions. Unfortunately, it is not without risks because the continuation of this subjection is precisely what is creating a problem with the perception of the impartiality of military judges, as noted in the court martial decisions of recent months.

[72] I respect the decision of my colleague Sukstorf M.J. to be satisfied that the October 2019 order is no longer in effect and to continue presiding over trials. This was not sufficient for my colleague d'Auteuil M.J., but the deletion of paragraph 9 of CFOO 3763, no doubt in reaction to his declaration in *Christmas*, was for him a sufficient gesture of good faith to sway the perception of earlier orders. I respect his decision as well and agree that the deletion was a gesture of good faith. However, in my view, this action is insufficient to address the real issue of the continued subjection of military judges to the disciplinary process administered by the military hierarchy. In the absence of a clear statement from the executive that the law established in *Pett* applies, this subjection will lead a reasonable, well-informed person to conclude that military judges do not enjoy the degree of independence and impartiality required by the *Charter* for the benefit of those subject to the CSD.

Am I bound by the conclusion or the disposition in Jacques?

[73] In *Proulx*, I referred to the importance of the principle of judicial comity for military judges. My fellow military judges have done likewise. On this issue, counsel

for the applicant submits that judicial comity can no longer be applied now that d'Auteuil M.J. and I have decided to depart from *MacPherson et al.* in *Christmas* and *Proulx*, respectively. The representative of the DMP is urging me to reach essentially the same disposition as my colleague d'Auteuil M.J. did in *Jacques*, at the risk of causing a crisis in the administration of courts martial.

[74] I firmly believe that the principle of judicial comity continues to be important even at this stage of the debate on the judicial independence of military judges. I have explained its application in detail in paragraphs 71–83 of *Proulx*, specifically discussing the impact of earlier decisions on a similar application in *MacPherson et al.* and *Christmas*. I basically concluded that my decision went against *MacPherson et al.* because I chose to analyze an element that I believed had not been analyzed in *MacPherson et al.* and that had a direct impact on the disposition by my colleague. In terms of *Christmas*, I concluded that judicial comity was not violated because I was reaching the same disposition, albeit by a different path that, among other things, did not lead to a declaration of invalidity.

[75] With respect to the disposition that I should make in this application, I wish to reassure the respondent that I fully understand the urgent pleas regarding the practical consequences of my reluctance to follow the path set out by the other two military judges who have ruled on this issue with respect to the administration of military justice in courts martial. I currently have a number of cases dealing with various offences, including operational breaches, theft and possession of stolen goods, and sexual misconduct, including sexual assault. I am aware of the practical impact that my decision will have; however, I believe that my decision will be relevant only in terms of the reasons for applying judicial comity, namely the correctness and consistency of the law.

[76] The legal issue at the heart of this decision and my analysis is based on an objective test, namely a reasonable, well-informed person's perception of the status of military judges as an independent and impartial tribunal. The issues are not specific to a given military judge. This is what enabled me, despite my conclusions on the independence and impartiality of military judges, to proceed with Master Corporal Pett's trial and to subsequently hear other trials and render judicial decisions where the issue of the independence of military judges was not raised. Therefore, there is no personal impediment to applying judicial comity in this case.

[77] Still, judicial comity is not absolute. As stated in *R. v. Caicedo*, 2015 CM 4018 at paragraph 20, the principle should not be invoked to perpetuate an error in law. This is an important factor to consider in light of the significant reservations that I have expressed with respect to the analysis and conclusions in *Jacques*. I also note, as argued by the applicant, that my position in this decision and in *Proulx*, namely that an acknowledgement of the law established in *Pett* is the only way to ensure respect for the rights of accused persons before courts martial, enables me to interpret more flexibly the principle of *res judicata* and judicial comity, given that the issue at stake is likely to affect a citizen's *Charter* rights. At least that is what a majority of the Court Martial

Appeal Court of Canada (CMAC) determined on this specific issue at paragraph 21 of *Beaudry v. R.*, 2018 CMAC 4, a decision later set aside by the Supreme Court of Canada, although not on this point, despite the specific arguments of one intervener regarding the general issue of judicial comity.

[78] I am of the opinion that, in the circumstances of the present case, considering the errors that I felt respectfully obliged to raise with respect to *Jacques*, I must be consistent with the position that I expressed earlier on protecting the rights of the accused before a court martial, and that I must therefore dispose of this case differently from the outcome in *Jacques*.

[79] I therefore conclude that, in my opinion, Sergeant Cloutier's right under paragraph 11(*d*) of the *Charter* to be tried by an independent and impartial tribunal was violated by the obligation imposed on him to appear before a court martial in this case. The respondent failed to provide any justification under section 1 of the *Charter* for this violation.

Appropriate remedy

[80] The issue of the appropriate remedy has been discussed in decisions rendered in summer 2020 and more recently in *Christmas* and *Proulx*. I am following the analysis in *Iredale* and *Proulx*. In doing so, and for the reasons given in those decisions, I am of the opinion that the force of inertia strongly supports a stay of proceedings in this case.

[81] That said, the fact remains that a stay of proceedings is the most severe remedy for a violation of an accused person's rights, and careful consideration based on the facts of each case must be given to whether a less drastic remedy could cure the violation with fewer collateral effects.

[82] I spoke with counsel for the respondent during oral argument about the possibility of alternative remedies such as recusal, adjournment or the possibility of terminating the proceeding without adjudication. I do not believe that recusal is an appropriate remedy, since the practical effect of recusal would be merely to pass the matter on to another judge, force counsel to make submissions again, and have the matter decided by another judge in a manner that some might describe as predictable, likely leaving Sergeant Cloutier without a remedy for one or more appearances before a military judge in violation of his rights, at least according to my conclusion.

[83] As for adjournment, this was an option discussed in *Iredale* but rejected for the reasons stated in paragraph 56 of that decision. I believe that the situation today is similar. The advantage of adjournment, in theory, would be to give the executive time to reconsider my proposed solution of acknowledging the law established in *Pett*, to adopt it and to come back to me with the argument that such acknowledgement has been made, thus allowing the trial to proceed. However, I must avoid speculation. Before me, counsel for the respondent gave no indication that such an acknowledgement was foreseeable, choosing logically to argue that I should follow the

solution adopted in *Jacques*. In the circumstances, I am not persuaded of the advantage of an adjournment that would likely give rise to an apparent confrontation between the executive and the judiciary, or at least one of its representatives, which would be in no way helpful for the administration of justice and, moreover, would offer Sergeant Cloutier no tangible remedies.

[84] I have therefore considered the possibility of terminating the proceedings without adjudication. This less drastic solution still offers a tangible remedy to Sergeant Cloutier, while recognizing the positive gestures made by the executive following *Proulx*, in terms of the response to the decision of d'Auteuil M.J. in *Christmas*. My hope is that a similar positive response will be achieved in this case. This would make it possible for cases scheduled in the next few months to end with a final determination on the charges, an outcome that benefits both the prosecution and the accused. At the same time, I must consider that the executive may wish to maintain the legitimate position taken so far of not acknowledging the binding nature of the law established in *Pett*. By terminating the proceedings, I am giving the respondent the right to an immediate appeal and, at the same time, the opportunity to try to re-initiate his action if the law or the facts change in the short or medium term.

[85] This is my preferred solution. I am of the opinion that this debate can be ended in a simple way that is neither cumbersome nor costly. If, as counsel for the respondent submits, d'Auteuil M.J. is correct that the CDS has acknowledged the applicable law, it will not be difficult for the CDS and the DMP or his representative to state this clearly, at the risk of repeating themselves. I do not intend to depart from the position taken to date to the effect that I am not prescribing a specific way to proceed. As stated in this decision, the message must be clear regardless of the medium. I should mention, however, that I do not expect to be directly concerned: the issue of the independence of military judges is not specific to me. It is a matter for those who are subject to the CSD and for the public.

Closing remarks

[86] I find myself in a difficult situation, as I feel that I must position myself at odds with two esteemed colleagues. There are many areas of agreement among military judges. Both of my colleagues have recognized that a situation that enables members of the military executive to charge and prosecute a sitting military judge through the disciplinary regime applicable to CAF officers and administered by the military hierarchy violates the principle of impartiality, an essential component of judicial independence. They have also recognized that military judges may make a statement of the law on this issue that imposes a duty on the executive to respond appropriately to dispel any concerns as to whether the public and those subject to the CSD have confidence in the impartiality of the military judiciary.

[87] Nevertheless, I respectfully submit that both of my colleagues were satisfied with partial solutions that addressed specific symptoms of the lack of independence without addressing the root cause of the disease. They wish, as I do, to preside over

courts martial on their merits in the way we did before this difficult debate began. Their analyses show that they have chosen to accept what they consider to be olive branches from the executive. I understand and respect their decisions. I could have done the same and found a way to distinguish the current situation from the one I analyzed in *Proulx* in November 2020.

[88] The path I have chosen may seem rather rigid in terms of my approach. This rigidity reflects my firm belief that subjecting military judges to a disciplinary regime administered by the military hierarchy, including members of the executive who testify and argue before them, is inconsistent with judicial impartiality. I take no personal pleasure in terminating proceedings and in being in apparent conflict with members of the executive, whom I respect and whose goals for the proper administration of justice are not unlike my own. It is never easy to defend fundamental freedoms through new ideas that, for legitimate reasons, are not accepted by all. However, that is my duty. I believe that my conclusions and proposed disposition of this case provide the best way to administer justice and bring about the changes that are, in my opinion, necessary.

[89] To be clear, as the law currently stands, nothing prevents an NIS military police officer who hears what I am saying right now from forming a reasonable perception that my statements constitute conduct to the prejudice of good order and discipline, drafting charges related to this perception, and laying those charges on my next visit to a military base. The member could submit the charges to a commanding officer, and, through the chain of command, the case would be referred to the DMP, who would then assign one of his prosecutors to prosecute me at trial, where I could face imprisonment. I am fully aware that the professionalism and good faith of the military police and prosecutors will no doubt prevent this catastrophic scenario from occurring; however, the Supreme Court of Canada teaches us that the rights of litigants must not depend on the good faith of prosecutors. The fictitious scenario I have just described, which is worthy of the most authoritarian regime, could occur under Canada's existing legislative and regulatory framework. I must agree with counsel for the applicant that this situation defies common sense. I firmly believe that my decision today will help to change this situation without undue cost.

FOR ALL THESE REASONS, THE COURT:

[90] **GRANTS** in part the application.

[91] **DECLARES** that the right of Sergeant Cloutier under paragraph 11(*d*) of the *Charter* to a hearing by an independent and impartial tribunal has been violated.

[92] **DIRECTS**, pursuant to paragraph 24(1) of the *Charter*, that the proceedings be terminated without adjudication.

[93] **DISMISSES** the applicant's other applications for declaratory relief.

Counsel:

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Sergeant J.R.S. Cloutier, the Applicant

The Director of Military Prosecutions as represented by Lieutenant-Colonel D.G.J. Martin, Major H. Bernatchez and Major E. Baby-Cormier, Counsel for the Respondent