COURT MARTIAL

Citation: *R. v. Cogswell,* 2020 CM 2014

Date: 20201211
Docket: 201935

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Bombardier C.H. Cogswell, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

DECISION ON A DEFENCE APPLICATION FOR A RECUSAL

(Orally)

[1] The application before the court requests that I, as the military judge assigned to preside over the applicant's court martial, recuse myself from hearing Bombardier Cogswell's paragraph 11(*d*) *Charter* application that was filed concurrently with the application for my recusal. The request arises from comments that were made by myself primarily during a teleconference on 18 November 2020 intended to address a request for adjournment. As this is no ordinary situation, it is imperative that the court provide the necessary background and context. Consequently, the court will first describe the charges that the applicant faces, then provide the context of the underlying issue that makes up the basis of the accused's application claiming of violation of her paragraph 11(d) *Charter* rights and then outline the progression of her charges within the military justice system.

Charges

[2] The allegations before the court relate to an alleged incident that occurred on 21 July 2018, involving members of W Battery, Royal Canadian Artillery School, who were scheduled to conduct a live fire portion of Exercise COMMON GUNNER at Canadian Forces Base (CFB) Gagetown, New Brunswick. That day the applicant was working the canteen and allegedly had prepared cupcakes which were distributed to her colleagues. All the members of W Battery who consumed the cupcakes, except one, allegedly experienced symptoms which included dehydration, overheating, fatigue, confusion, dry mouth and paranoia. Several affected members were allegedly unable to properly execute safe weapons and explosive handling drills. That afternoon, the affected members were treated by a medical technician and the military police were called.

[3] On 21 June 2019, the prosecution preferred 18 charges against Bombardier Cogswell, flowing from an alleged distribution of the cupcakes containing cannabis to Canadian Armed Forces (CAF) personnel during domestic live fire exercises. Charges 1 and 2 are alternative charges and allege a general contravention under section 93 of the *National Defence Act* (*NDA*) for behaving in a disgraceful manner and alternatively under section 129 of the *NDA* for an act to the prejudice of good order and discipline during military training. In addition, there are eight sets of charges (alternatives to each other) laid under both section 129 of the *NDA* as well as section 130 of the *NDA* for allegedly administering a noxious thing, contrary to paragraph 245(1)(b) of the *Criminal Code*. The eight sets of charges relate specifically to allegations that Bombardier Cogswell caused the named individuals to use cannabis with intent thereby to aggrieve or annoy.

Background

[4] During much of 2020, courts martial responded to multiple applications raised by a number of defence counsel that a Chief of the Defence Staff (CDS) Order issued on 18 October 2019 undermined judicial independence. Put simply, the CDS Order delegated power to the Deputy Vice Chief of the Defence Staff (DVCDS) to lay charges against a military judge if he or she is alleged to have committed a service offence.

[5] The military judiciary is small and there are only four judges when at full strength. With respect to those issues of judicial independence flowing from the CDS Order, only three military judges heard these applications. Due to the nature of courts martial proceedings, the same indistinguishable issues must be reheard in every court martial where it is raised. In *R.* v. *D'Amico*, 2020 CM 2002 which is one of the first cases that I heard on this issue, I explained why:

> [23] A court martial is a statutory court that has the same powers, rights and privileges as a superior court of criminal jurisdiction including the power to punish for contempt as are vested in a superior court of criminal jurisdiction and with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and to all other matters necessary or proper for the due exercise of its jurisdiction.

> [24] In a nutshell, the SCC decision in *Lloyd* limits judges not otherwise foreseen under the *Constitution Act* from making general declarations of invalidity of legislation passed under section 52 of the *Constitution Act*. However, *Lloyd* does clarify that courts have the power to decide on the constitutionality of laws that are properly before the court. In courts martial, military judges have the power to decide all those matters required to properly adjudicate the cases before them. If an issue arises as to the constitutional validity of a law, order or policy, a military judge has the power to determine the issue as part of its decision-making process in the particular case before them.
>
> [25] The effect of a finding by a military judge that the CDS Order 2019 does not conform to the *Constitution* permits the judge to refuse to apply it in the case before it, but until the order is formally cancelled or rescinded, it remains in full force and effect.

[6] In the first case where this particular issue of judicial independence was raised, on 10 January 2020 in *R. v. Pett*, 2020 CM 4002, Pelletier M.J. struck down the concerning paragraphs of the CDS Order and found that absent the CDS Order 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 the *Canadian Charter of Rights and Freedoms* requirements.

[7] Six weeks after the *Pett* decision, in *D'Amico*, as the trial judge, I was asked to review the identical application again, where I also struck down the same concerning paragraphs for being of no force or effect. In neither *Pett* nor *D'Amico* were there personal remedies granted to the accuseds.

[8] On 10 July 2020, six months after the first declaration was made in *Pett*, the CDS Order still had not been rescinded. Just prior to the start of the court martial in *R. v. Bourque*, 2020 CM 2008, similar to this particular case, the defence counsel also raised an application at the last minute challenging the independence of the military judiciary. However, in *Bourque*, the prosecution submitted an application to quash the defence's motion since it was filed without the required notice and just prior to the start of the court martial.

[9] The defence application filed in *Bourque,* required the court to speculate on the motivation of the CDS for not complying with the courts' martial decisions. In response, the court expressed concern with what it viewed as a lack of evidence of the defence position that the CDS was flagrantly ignoring judicial direction. The court stated that in light of all the ongoing operational issues, including the CAF's contribution to the government's efforts regarding the COVID-19 pandemic, it was very possible he was not even aware of the decisions rendered in *Pett* and *D'Amico*. Neither counsel could confirm for the court that the CDS had actually been briefed on the decisions rendered in *Pett* and *D'Amico* and the judicial direction enunciated therein. The court reminded counsel of their responsibility to give effect to the court's direction and then adjourned the hearing into the prosecution's application to quash the defence's motion in order to provide counsel time to ensure that the CDS had in fact been informed and to provide him the opportunity to revoke the CDS Order. As the paragraph 11(d) *Charter* right belongs to the accused and he later agreed to a plea

bargain withdrawing his application, the court did not engage in any further analysis of either motion.

[10] On 14 August 2020, in the cases of *R. v. Edwards*, 2020 CM 3006 and *R. c. Crépeau*, 2020 CM 3007, d'Auteuil A/C.M.J. heard the exact same application and given the lack of reaction from the Executive, he issued the two accused in those cases stays of proceedings. One month after that, stays of proceedings were ordered on 10 September 2020 in the case of *R. c. Fontaine*, 2020 CM 3008 and then again on 11 September 2020 in the case of *R. v. Iredale*, 2020 CM 4011.

[11] On 15 September 2020, the CDS suspended the impugned CDS Order. However, the Suspension Order refers to the fact that Canadian Forces Organization Order (CFOO) 3763 which sets out the organization of the Office of the Chief Military Judge (OCMJ) remains in effect. It was this reference to CFOO 3763 that seems to have given a second life to the original concerns raised regarding judicial independence flowing from the CDS Order.

[12] On 2 October 2020, not aware that the CDS had suspended the impugned CDS Order, the applicant's counsel Mr Kasper, submitted a Notice of Application seeking a stay of proceedings in the applicant's case related to the continued presence of the impugned CDS Order.

[13] On 7 and 8 October 2020, the court in *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012 (*MacPherson et al.*) heard further submissions on the lack of judicial independence rendering an oral decision on finding alone on 14 October 2020, with the formal written reasons delivered on 23 October 2020. Similar to the situation in *Bourque*, the court found that there was not sufficient evidence for the court to infer that that the Suspension Order was intended to send a message to the judiciary and absent evidence, it refused to speculate on the motivation of the CDS for making the reference to CFOO 3763. More specifically, it accepted as a fact that the CDS Order was no longer of force or effect concluding that absent the CDS Order, there were sufficient guarantees of judicial independence in the *NDA* to guarantee an accused's paragraph 11(*d*) *Charter* rights.

[14] With respect to the impact of CFOO 3763 itself, in applying the reasonable person test set out by the Supreme Court of Canada (SCC) and described in *MacPherson et al.*, I did not find it appropriate to give effect to an outdated organizational document that refers to a unit that no longer exists in name and relies upon a supplemental CFOO that has been superseded and which says nothing about the administration of discipline. Without evidence before the court as to the meaning of "DISCIPLINED IAW CFSU (OTTAWA) CFOO," the court found it impossible to speculate on the validity of the arguments put forward by defence counsel. Unlike the CDS Order, there was no overbroad language that violated other NDA provisions or the *Charter*, nor did it purport to displace or usurp the role of Military Judges Inquiry Committee as a priority in administering discipline to military judges.

[15] On 10 November 2020, three weeks after the written decision in *MacPherson et al.* was rendered, in the case of *R. v. Christmas*, 2020 CM 3009, d'Auteuil A/C.M.J. rendered an oral decision on the same indistinguishable issue of judicial independence based on the CDS Suspension Order, but conversely, he found that since CFOO 3763 had similar wording to that in the CDS Order, in his assessment, the concerns for judicial independence were not cured by the Suspension Order. His reasons were articulated as follows:

> [72] I agree that paragraph 9 of CFOO 3763 makes CAF officers holding the office of military judge subordinated to the authority of a commanding officer for making them subject to the regime in the CSD dealing with a service offence with respect to any disciplinary matter involving a military judge. This document relied on the legal structure put in place for all officers and non-commissioned members on the strength of the NDHQ. The effect of paragraph 9 of CFOO 3763 is to allow the application of this legal structure to CAF officers holding the office of military judge, which includes the application of the regime in the CSD dealing with a service offence to them. In essence, the situation is not different than the one considered in some recent decisions delivered by courts martial since the beginning of 2020 concerning the CDS Order date 2 October 2019.
>
> [73] The practical effect of such situation is that the CDS, through CFOO 3763 issued on his behalf, makes possible the use of the regime in the CSD dealing with a service offence towards CAF officers holding the office of military judge, while the legislator has clearly established a judicial complaints mechanism in the CSD as the primary means to address their misconduct.
>
> [74] As a result, I conclude that a reasonable and informed observer, being aware of the context I have just described, viewing the matter realistically and practically would conclude that CAF officers holding the office of military judge and presiding at a court martial are not free from pressure by the executive. In addition, it raises concerns as to the confidence of the public and the persons subject to the CSD may have regarding the independence of the military judiciary.
>
> [75] The mention by the CDS of CFOO 3763 in his order dated 15 September 2020 concerning the suspension of the CDS Order dated 2 October 2019, the latter considered by courts martial as extending specifically to the military judges the regime in the CSD dealing with a service offence, does not help to conclude differently. To the contrary, by virtue of reiterating the existence of CFOO 3763 contributes to maintaining in the eyes of a reasonable and well informed observer, the impression that the regime in the CSD dealing with a service offence towards officers still applies to military judges, no matter what the real intent of the CDS as a signing authority may be.

[16] After striking down paragraph 9 of CFOO 3763, d'Auteuil A/C.M.J. granted Corporal Christmas a personal remedy of a stay of proceedings. It was shortly after the oral pronouncement of the decision in *Christmas* and the issuance of the stay of proceedings that significant confusion reigned and the teleconference before the court unfolded.

[17] It is also important to note that almost immediately after the decision in *Christmas* was released, in light of the clear direction that d'Auteuil A/C.M.J. issued identifying what he viewed as the problematic paragraph, the Executive reacted

immediately and the CDS ordered the impugned provisions in CFOO 3763 to be revoked.

[18] On Wednesday, 18 November 2020, paragraph 9 of CFOO 3763 was officially revoked and a new CFOO 3763 was reissued thereby curing the only deficiency identified by d'Auteuil, A/C.M.J. in *Christmas*.[1]

[19] The teleconference that makes up the majority of the application before the court occurred on the same day that the Executive corrected the identified deficiency in *Christmas*.

[20] During the same time frame, on 12 to 13 November 2020, in the case of *R. v. Proulx*, 2020 CM 4012, Pelletier M.J. also heard an application as to whether the CDS Suspension Order had cured concerns previously identified with respect to the impugned CDS Order. Immediately upon the completion of arguments, Pelletier M.J. granted the defence's application indicating his written reasons, to explain why, would follow. From the bench, he issued the accused a stay of proceedings. It was not until a week after the teleconference in question, on 24 November 2020, that Pelletier M.J. issued his written reasons in *Proulx*. He concluded the following:

> [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.

[21] On 2 December 2020, at the time the applicant filed her materials, with respect to the CDS Suspension Order, two of the three judges had found some infringement that breached an accused's paragraph 11(*d*) *Charter* rights and were granting stays of proceedings. I was the only judge who did not find an infringement flowing from the CDS Suspension Order.

[22] Two days later, on 4 December 2020, in *R. c. Jacques*, 2020 CM 3010, d'Auteuil A/C.M.J. rendered a second decision on the impact of the CDS Suspension Order, but this time he found that the Executive's immediate reaction to revoke what he had identified as the problematic paragraph in CFOO 3763 was sufficient and he found that there were no more lingering issues of concern. He declined to grant the defence's application.

---

[1] 181645Z NOV 20 - SUBJ: CANADIAN FORCES ORGANIZATION ORDER 3763 - OFFICE OF THE CHIEF MILITARY JUDGE

[23] At the time of the hearing into the application for recusal before the court, Pelletier M.J. was in deliberations prior to rendering his second decision on the effect of the CDS Suspension Order in the case of *R. c. Cloutier*, 2020 CM 4013.

Background on the applicant's case

[24] On 24 January 2020, the Court Martial Administrator issued a convening order scheduling Bombardier Cogswell's Standing Court Martial to begin on 24 May 2020 in Gagetown, New Brunswick.

[25] On 16 March 2020, due to the ongoing COVID-19 pandemic, the A/CMJ directed the Court Martial Administrator to cancel all convening orders for courts martial to be held between 16 March and 5 April 2020.

[26] On 27 April 2020, the court was informed via a defence application that Bombardier Cogswell had fired her defence counsel and he filed a Notice of Application with the court to be removed as counsel of record for her.

[27] On 11 May 2020, the court approved a change in counsel for the applicant with Mr Kasper becoming counsel of record.

[28] On 14 May 2020, for all courts martial that required travel, d'Auteuil A/C.M.J. extended the cancellation of all convening orders to 31 May 2020. Since Bombardier Cogswell's court martial was set to begin in Gagetown, New Brunswick on the 24th of May 2020, it required rescheduling.

[29] On 3 June 2020, the court held a conference call to confirm new dates for Bombardier Cogswell's trial. At the time, the court expressed a desire to get as much done during the summer months prior to the second wave of the pandemic. On 10 June 2020, during a follow up conference call, the parties finally agreed to the new trial dates of 23 November to 11 December 2020. These later dates were specifically chosen to permit Mr Kasper, Bombardier Cogswell's new defence counsel sufficient time to become familiar with her file and to accommodate his personal court schedule. Prior to confirming these dates, the accused had to waive her paragraph 11(b) *Charter* rights to accommodate the new defence counsel's calendar and it was understood that the dates agreed to were beyond the eighteen month Jordan timeline established by the SCC. Any further changes to these dates would require a subsequent waiver.

[30] As mentioned earlier, on 2 October 2020, after the issuance of stays in similar applications, the applicant's counsel Mr Kasper, submitted a Notice of Application for Bombardier Cogswell seeking a stay of proceedings alleging a violation of paragraph 11(d) *Charter* rights related to the continued presence of the impugned CDS Order.

[31] On 16 October 2020, during a teleconference, the applicant's counsel acknowledged that since the CDS Order had been suspended and the court in

MacPherson et al., found no further infringements that lingered with respect to the paragraph 11(d) *Charter* rights of an accused, he would withdraw his application. After a subsequent discussion, the court advised him that since the Court Martial Appeal Court (CMAC) was seized of the issue of independence of the military judiciary, the Applicant's Original Notice of Application related to an alleged infringement of her paragraph *11(d) Charter* rights filed on 02 October, 2020 should be dealt with at the start of her court martial proceedings in order to preserve her right of appeal on the issue.

[32] On 12 November 2020, upon learning of the court martial decision rendered in *Christmas*, which conversely found that the threat to judicial independence had not been cured, defence counsel for Bombardier Cogswell, Mr Kasper, sought the audio recording of the oral ruling delivered by the d'Auteuil A/C.M.J. in *Christmas* and requested a teleconference.

[33] The next day, on Friday, 13 November 2020, a teleconference was held where Mr Kasper advised the court that, given the lack of judicial comity, he would seek an adjournment of Bombardier Cogswell's court martial until the issue of judicial independence had been resolved by the CMAC. The prosecution advised the court that they would oppose such an adjournment. As such, a hearing was scheduled for the court to hear this request as soon as possible on 17 of November 2020 just days before the court martial for the applicant was set to begin.

[34] The next working day, being Monday, 16 November 2020, the OCMJ was advised that in light of the recent court martial decisions and the concerns raised with regard to paragraph 9 of CFOO 3763, the CDS had ordered the CFOO revoked and reissued with paragraph 9 removed.

[35] On 17 November 2020, at the hearing scheduled to consider an adjournment, the lead counsel for the applicant, being Mr Kasper, advised the court that he now intended to file a formal application alleging that his client's rights had been infringed over the last year as a result of the CDS Order being in effect. A little shocked by yet another last minute change, the court reminded him that it would expect specific evidence on the issues raised and further explained that if he was seeking a stay, that the court required him to bring forward specific case law and precedent that would provide the court such authority. The court explained that the granting of a judicial stay is the most extreme remedy in law and if the court identifies an infringement, its primary duty is to impose a remedy with the view of correcting that infringement first and if a personal remedy was appropriate for an accused, the court had a responsibility to consider alternative remedies prior to the consideration of a stay. At the hearing, the court agreed to consider the adjournment request for Mr Kasper to permit him to prepare his application, but the parties also acknowledged that he had to seek instructions from his client regarding a waiver with respect to the dates. The new start date for the trial date being considered at that time was 7 December 2020.

[36] The next day, Wednesday, 18 November 2020, the subject teleconference was held. It coincided with the same day the problematic CFOO 3763 was reissued, revoking the impugned paragraph 9. It was also two working days before the start of the applicant's trial was scheduled to begin in Gagetown, New Brunswick, the coordination for which had required endless hours to attain the required provincial and health approvals to ensure the court martial could unfold in conformity with the New Brunswick provincial restrictions. Thousands of dollars had been spent in arranging the travel of a number of witnesses, counsel and court staff required for the court martial. It is important to be aware that the applicant's court martial had already been rescheduled from May 2020, to late November 2020 beyond the eighteen month Jordan deadline at the specific request of the applicant and Mr Kasper.

[37] Importantly, at the time of the purported teleconference, all the deficiencies that d'Auteuil, A/C.M.J. identified in *Christmas* had been cured. The conference call was intended to administratively confirm new court dates and set a way ahead in addressing the applicant's proposed new application in light of the divergence in judicial comity that flowed from the court martial decision in *Christmas*. It was during that teleconference that the court was informed for the first time that the Director of Defence Counsel Services (DDCS) had now assigned Captain Sommers as special counsel for the sole purpose of raising the accused's application in a preliminary proceeding alleging that her paragraph 11(*d*) *Charter* rights had been infringed.

Issue before the court

[38] The applicant seeks that as the military judge assigned to preside at her trial that I recuse myself from presiding over her paragraph 11(*d*) *Charter* application filed concurrently with this application. There was no objection raised to myself trying the accused in the court martial itself. However, the court informed counsel it is imperative that the accused understand that the trial judge assigned to preside her court martial must be the same judge to consider any constitutional arguments.

[39] The respondent opposes the court's recusal.

Recusal in general

[40] As I explained to counsel during the hearing on this matter, the concept of judicial recusal in the colloquial sense encompasses a wide discretion that is often personally exercised by judges for various reasons prior to the start of a trial when they feel that such action is in the interests of fairness. However, it is imperative that such instances of personal recusal considered or exercised by judges not be confused or conflated to mean that the judge is disqualified pursuant to the strict legal standard requiring that reasonable apprehension of bias has been met.

Disqualification

[41] The test for disqualification was first expressed in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45 as follows:

> [60] In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369] at p. 394, is the reasonable apprehension of bias:
>
> > … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[42] The test was later described in a number of introductory paragraphs by the SCC in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

[43] Most importantly the objective elements of the test of the reasonable apprehension of bias require that, separately, both the person considering the alleged bias and the apprehension of bias itself be reasonable within the context of the case.[2] In short, the analysis is contextual and inquiry is fact specific. There are no textbook instances of reasonable apprehension of bias.[3]

[44] The most important thing to remember is that there is a strong presumption of impartiality in a judge and substantial indications of bias are necessary to displace this presumption.

---

[2] *R. v. S. (R.D.)*, 1997 3 S.C.R. 484 at paragraph 111.
[3] *Wemaykum* at paragraph 78.

[45] The criterion of disqualification goes to the judge's state of mind viewed from the objective perspective of the reasonable person and not the higher standard of a "very sensitive or scrupulous conscience."[4] There must be "convincing evidence" and the "threshold for a finding of real or perceived bias is high." (see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

Context of the case

[46] The responsibility for trial judges to deal efficiently with matters was highlighted in paragraphs 37 and 38 of the SCC decision in *R. v. Cody*, 2017 SCC 31. The issue was also discussed by the Ontario Court of Appeal in *R. v. Kutynec*, 1992 CanLII 7751 (ON CA), [1992] O.J. No. 347 and later in by the British Columbia Court of Appeal in *R. v. Vukelich*, 1996 CanLII 1005 (BC CA), [1996] BCJ No. 1535 (QL).

[47] More specifically at paragraph 38 of *R. v. Cody*, 2017 SCC 31, the SCC stated:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 1992 CanLII 7751 (ON CA), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 1996 CanLII 1005 (BC CA), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.
>
> [Emphasis added.]

[48] It is well known in law that when an applicant seeks a last-minute adjournment, two working days before the trial is to commence, for the purpose of submitting a significant last-minute application, a trial judge is well placed to deny outright such a request. Importantly, when such a last minute request is made after the trial dates have been set beyond the eighteen month deadline, at the request of the applicant, the judicial concerns in responding to a request for an adjournment are magnified. The issue of judicial independence was not new, the applicant already had an application before the court with respect to it. As explained earlier, given the fact that the CMAC was already seized with the issues, the court had already previously advised defence counsel, Mr. Kasper that it would deal with the accused's application during the court martial, to ensure that her rights would be protected in the event that the CMAC rendered a decision that would be in her favour. Further, defence arguments had been floating around for almost a year within the military justice system. Further, the issue was also not new to Captain Sommers, the new defence counsel assigned to argue the application

[4] *Wewaykum* at paragraph 76.

as he was one of the first counsel to argue it in the cases of *Pett* and *D'Amico* and quite frankly the issues have not really changed much at all.

[49] The highlighted portion of the applicant's Notice of Application at paragraph 12 of one part of the conversation he most objects to reads as follows:

> "16 … I noticed that I afforded counsel
> 17 on this case [indiscernible] to you, Captain Sommers, I've
> 18 afforded you way too much time to bring forward an
> 19 application. Basically it's almost two weeks **to go on a**
> **20 fishing expedition** because the -- **all of the identified**
> **21 issues will have allegedly been corrected or cured by**
> **22 Friday**. So I'm really quite curious as to what you're going
> 23 to be bringing and doing."

[50] An analysis for determining whether or not there is a reasonable apprehension of bias requires context and the surrounding facts need to be considered. In his oral submissions, counsel suggested that explanations after the fact are not to be applied, indicating a resistance by him to acknowledge the actual test for determining whether a reasonable apprehension of bias exists. Comments cannot be removed from their context to make unfounded assertions. Captain Sommers argues that the fact that the court stated that "all of the identified issues will allegedly be corrected or cured by Friday," indicates prejudgment to his application. Firstly, a trial judge has the responsibility to ensure that all applications have a reasonable prospect of success and he or she is required to satisfy themselves accordingly. In some cases, an issue may have become moot or overtaken by events. This is particularly important to be aware of as the identified deficiency set out in *Christmas*, being one paragraph within a CFOO was an issue upon which the Executive could correct with relative speed and efficiency. A CFOO is a subordinate organizational document that can be amended immediately without any legislative or regulatory hurdles to cross. That was a fact and within days, the CFOO was indeed revoked with the impugned paragraph removed.

[51] In this context, in both his oral and written representations, counsel fails to recognize that there was an onus on him to provide the court with some evidence of what he intended to raise in his application. However, more confusingly, Captain Sommers grounded his position in saying at the applicant's Notice of Application at paragraph 14 "[t]he Court had no way of knowing what issues the Defence may have been contemplating raising in the application yet to be brought." With his reliance on this statement, he fails to see the obvious contradiction in his arguments. By his own assertion, he states that the court did not know the nature of his application, yet he also asserts the court prejudged the merits of that same application. His position is simply incoherent with itself.

[52] In his oral pleadings, Captain Sommers suggested it was an affront to his status as defence counsel and as an officer of the court that the court would even inquire of his intentions with respect to a last-minute application where he seeks a significant

adjournment to prepare it, and it being two days before the commencement of the court martial.

[53] However, the court in *Cody*, could not have been clearer, "before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success." This entails asking defence counsel to summarize the evidence it anticipates eliciting. The burden is actually quite low, but it does require sufficient factual foundation and legal argument.

[54] More specifically, the Court explains directly at page 12 of the transcript of the conference call of 18 November 2020 that the reason for seeking an adjournment to file an application should be readily apparent to him or he would not have asked. It goes on to say "If you say we've identified this as a problem, we need to examine it further, hey, you know me. I'm all open for it. But to just adjourn for blank periods of time so we can consider things implies that, you know, we're looking." More specifically, in reviewing the transcript in its entirety, it becomes clear that once Captain Sommers provides an appropriate meaningful response to queries at page 13, then the court is not only satisfied, but actually provides him extra time to prepare and the whole tone of the teleconference shifts. For these reasons, trial management issues generally do not normally give rise to a reasonable apprehension of bias.

[55] The burden for establishing actual bias or a reasonable apprehension of bias is on the applicant and the Court had to remind Captain Sommers during his oral arguments that the test requires more than someone eavesdropping on one telephone conversation. The SCC has been clear in *S. (R.D.)* that:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude.

[56] The one term that Captain Sommers seems to object most to is the court's reference to the term "fishing expedition*"* because he found it pejorative. The term has been used by the SCC and the term is not new to judicial parlance. It is often used by judges to ward off counsel who seek extra time or additional disclosure without being able to articulate why. As the court made clear, he either knew why he is asking to submit the application or he did not. In fact, by seeking an adjournment, to submit such an application, it should have been readily apparent to him the exact issue he intended to raise.

[57] At the exact time of the teleconferences and hearing, the identified deficiency regarding an accused's paragraph 11(*d*) rights articulated in *Christmas*, was either cured or being cured by the Executive. The mere fact that the court stated this does not in any way indicate prejudgment. It was actually the state of the law at that specific time. Keeping in mind that the adjournment had been specifically requested based on the decision in *Christmas* which only identified one deficiency and that rested with one paragraph within the CFOO. Yet, Captain Sommers also took offence to the court's

comment that "the matter I think has run its course. The purported infringements have been corrected." This comment is ironically very similar to the actual decision delivered orally shortly after the teleconference by d'Auteuil A/C.M.J. in the case of *Jacques*. In the *Jacques* decision, d'Auteuil A/C.M.J. accepted that the Executive's swift action to revoke the problematic paragraph reflected its good will and commitment and he concluded that from his perspective the issues concerning judicial independence had been appropriately resolved.

[58] It was only upon further questioning that the court was later informed that there was yet another decision that had been rendered orally by Pelletier M.J. in *Proulx*, but at the time, counsel were waiting as there was no written decision available.

[59] Based on the timeline being discussed, defence was seeking several weeks to prepare, while the prosecution was expected to work over a weekend to prepare its response so that the court could meet the dates preferred by counsel while fully expecting the court to provide its own decision right away. This same sentiment was also present this week in court when I advised counsel that I would take one full day to consider the recusal application and counsel expressed concern that his expected timeline was being inconvenienced.

[60] In short, trial judges have a duty to manage the trial (see *R. v. Ibrahim*, 2019 ONCA 631) and sometimes they become frustrated or even cranky. However, frustration with counsel and fatigue with an issue cannot be equated to mean that they are biased or they have prejudged a matter. In short, there was a demonstration of judicial impatience with counsel, but the relief that the applicant seeks requires more than that.

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.[5]

[61] The comments made by myself were uncharacteristically cranky of me, but they were also general in nature. Although a judge should refrain from losing her patience, the required analysis for judicial disqualification is not just contextual but the inquiry must be fact specific to determine if there is convincing evidence of substantial bias. Captain Sommers has not provided any evidence to validate his claim of substantial bias or anything at all linking what I said to the specifics of Bombardier Cogswell's application. He relies only upon speculation that the application would not be given proper consideration by the court. Importantly, the court provided him sufficient time to enable him to identify what to bring forward in his application. By his own admission, he argues the court did not know what he intended to bring forward so it is difficult to understand how the court prejudged the specifics of the application in question.

---

[5] Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at page 12 adopted in *R. v. R. (D.S.)* at paragraphs 35 and 119.

[62] In short, Captain Sommers relies upon snippets or selected phrases used by myself taken out of context of the surrounding circumstances to suggest to the court that the reasonable person who might happen to drop by and overhear a part of the conversation would have to assume that there was a reasonable apprehension of bias. His interpretation of the test for reasonable apprehension of bias is also not consistent with the SCC position set out in *S. (R.D.)* which requires more than a casual person listening in. The test more appropriately requires that the reasonable person is informed as follows:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude.

[63] In the applicant's Notice of Application at paragraph 23, Captain Sommers suggests that the comment he views the most concerning was that the court suggested that the applications were "… not being done in good faith." He suggests that "[t]o make such a comment is a clear negative predisposition toward such applications." Firstly, he completely misrepresents what was actually said and that the comment was not related to his particular application at all. In fact, he actually queried the court's comment and the court clarified that was not what the court meant. Despite his own lack of understanding of what was said, he somehow concludes ". . . that a reasonable informed person would clearly believe that any such judge would likely not decide such a matter in an unbiased manner." The court is left wondering what exactly "such a matter" is that he is referring to. In both his written and oral submissions, he was unable to articulate exactly what I was allegedly biased against. Without a reference to a specific issue that he intended to bring and how my comments relate to it, it is impossible to even analyze this assertion.

[64] On the issue of judicial independence, I have always been open to hearing evidence and arguments on the subject and the corresponding requirement to protect the paragraph 11(d) *Charter* rights of an accused.[6] In fact, it was my actual openness and willingness to accommodate the last-minute request of the defence which was the starting point setting out the surrounding context upon which the comments were actually made. It is also clear that the source of the court's frustration was defence counsel's expectation to be afforded a generous period of time to rework its application in comparison with the time to be afforded to the prosecution and the court in order to comply with tight timelines all outside the Jordan timelines.

[65] Given the fact that the application was raised at such a late juncture, and I could have refused to hear it, I did provide counsel sufficient time to prepare its submissions. Although I expressed frustration, specific words must also be viewed in the context of the actual actions taken and the surrounding events occurring. Captain Sommers was not being asked to provide his theory of the case, but given the circumstances, the court was justified in asking for an overview of the arguments and the position he intended to

[6] See this court's views in *D'Amico*, *Bourque* and *MacPherson et al*.

bring forward. At the time of the teleconference, my comments were consistent with the law at that moment, which was later enunciated by the d'Auteuil A/CM.J. in his oral reasons delivered shortly thereafter in *Jacques*. So, if Captain Sommers' reasoning has any merit, then it is clear that d'Auteuil A/C.M.J. too is now unable to hear any applications.

[66] In this case, the assessment of the allegation of bias or perceived bias requires a contextual and a fact specific inquiry related to the particular application to which it relates. In his request for recusal, Captain Sommers has presented no argument on how my comments could be interpreted or linked to having a closed mind with respect to the specific contents set out within Bombardier Cogswell's application. In fact, he does not once refer to the substance of Bombardier Cogswell's application in either his written or oral representations to this court. In order for him to have been successful, he needed to provide a substantial rebuttal to the ingrained presumption of a judge's impartiality. His arguments were not fact-specific, but rely strictly upon select parts of my contribution to teleconferences and a hearing to broadly speculate that I was biased in general. The actual evidence leads me to admit I was unusually cranky, but absent any connection to the actual substance or arguments submitted within Bombardier Cogswell's application itself, it is impossible to provide any merit to his assertion. There is simply no evidence that the court did not have an open mind with respect to the specific content and substance of Bombardier Cogswell's application which was only later submitted with the actual application for recusal.

Personal aspect

[67] Based on a review of the facts submitted as well as the case law, it is clear that I am not disqualified from hearing the application filed by the applicant. However, it is also an unavoidable fact and Captain Sommers is well aware that I have rendered several significant court martial decisions on the same indistinguishable issue, which includes a recent 40-page decision in *MacPherson et al.* My views on the issues are extensive, published and transparent and in no case have I ever granted a stay of proceedings to an accused for the type of infringement identified in this type of application.

[68] There has not really been substantial disagreement between the military judges on the critical importance of judicial independence in protecting an accused's rights, nor is there disagreement on the corresponding requirement by the judiciary to zealously and proactively guard this right. Further, I do not take exception to the divergence in judicial views on whether the specific concerns identified in the CDS Suspension Order have been cured or not as set out in the decisions in *Christmas* and *Proulx*.

[69] However, it is this court's view, the most significant diversion in judicial views flows from the granting of judicial stays as personal remedies to the accused in this type of application. Although my brother judges have their own reasons for granting such an extreme remedy, the mere fact that a judicial stay now appears to flow almost automatically following an identification of a breach of an accused's paragraph 11(d)

Charter rights has incentivized every accused to submit applications on this issue with the full expectation of receiving a judicial stay. Consequently, it was no secret that an accused that raised their application before a particular judge could reasonably expect a stay of proceedings.

[70] It is also an undeniable fact that the decision this court rendered in *MacPherson et al.* is the least advantageous to the applicant. Consequently, as I stated during the current hearing, I am particularly mindful of and very sensitive to the fact that the accused persons appearing before me, based on the exact same application, during the same time period, were denied a judicial stay, while other accused members who in some cases were charged with more serious offences received one.

[71] As I mentioned earlier, the term of judicial recusal encompasses a wider spectrum and in a colloquial sense includes cases where a judge may choose for other reasons to step down from a case, even though they are not legally disqualified. As I expressed to counsel, in a perfect world, given the diverging decisions by the military judges at the same level and the fact that I have already weighed in on the majority of the issues, I would have preferred to recuse myself so that another judge who has not previously heard this issue could consider the application. Unfortunately, this is not a luxury we have with such a small bench. All of the available judges have already contributed meaningfully to the jurisprudence on the effect of the Suspension Order itself. Upon me stating this, Captain Sommers immediately cautioned that it was improper for the court to consider this as a factor. Although he is correct that it would be improper in a situation where I was legally disqualified, where a judge considers recusal for other reasons, this type of consideration plays an important role.

[72] Judges must be particularly mindful that a decision to recuse himself or herself on what is otherwise inadequate grounds in general, promotes judge shopping, disrupts the proper disposition of the case and wastes scarce court resources (see *Alberta Health Services v. Wang*, 2018 ABCA 104) and should be discouraged in every instance. Based on the current situation, it is inherently obvious that the greatest danger to the integrity of the military justice system is endorsing the status quo which has the second order effect of encouraging an accused to seek a favourable result simply by trying to have the most favourable judge assigned.[7]

[73] However, even if this court had this option, as Thackray J. noted in *R. v. Quinn*, 2006 BCCA 255, relying on the SCC's position in *Wewaykum*, the British Columbia Court of Appeal stated:

> . . . judges must be careful not to create the impression that they are disqualified when in law they are not." The Supreme Court said in *Wewaykum*:
>
> > As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, [1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484] at para. 32, the presumption of impartiality carries considerable weight, and the law should not

[7] See *R. v. Michell*, 2002 BCSC 3, [2002] B.C.J. No. 1378 (QL) at paras 39 and 40 (S.C.)

> carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.

Conclusion

[74] In summary, during a relatively short period of time, courts martial have rendered repetitive decisions where at least 15 different accused raised the issue of judicial independence in some capacity. Although there was unanimity amongst military judges in identifying that the CDS Order 2019 undermined judicial independence, the same unanimity does not exist with respect to the CDS Suspension Order issued by the Executive for the purpose of curing the problems flowing from the CDS Order 2019. There is relative agreement amongst the military judiciary on the fundamental issues, but several of the recent decisions are contradictory on whether the CDS Suspension Order continues to be a source of concern undermining the judicial independence of the military judiciary in such a manner that it compromises the paragraph 11(*d*) *Charter* rights of accused persons.

[75] The first decision issued after the imposition of the CDS Suspension Order, *MacPherson et al.*, found no lingering issues undermining judicial independence. The second decision in *Christmas*, found that due to the continued existence of CFOO 3763 that sets out commanding officers for military personnel posted to the OCMJ, that paragraph 9 needed to be revoked which the Executive immediately did. That decision was followed up by the decision in *Proulx*, where Pelletier M.J. found that the problem was not so much with CFOO 3763, but that the wording in the CDS Suspension Order would cause the reasonable well-informed person reading it not to be assured that the disease he identified in his earlier decision in *Pett* was being addressed. Finally, in the case of *Jacques*, d'Auteuil A/C.M.J. has now concluded that the actions taken by the Executive to revoke paragraph 9 of the CFOO 3763 cured the deficiencies.

[76] In a well-resourced system such as the military justice system, accused are provided significant resources and as we witnessed with these applications, they have the time and means to continually revisit the same issues. It is inevitable that the perpetual litigation on the same issue will eventually yield a result desirable for each of the parties which they in turn can use to argue before the next judge. There is no better way to describe the continual reconsideration of the same issue than to refer back to my comment made in *Bourque*:

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

[77] It is undeniable that the integrity of the military justice system has been compromised from the lack of predictability on this particular issue combined with the continual churn of the same applications that have yielded dramatically different remedies. At this point in time, based on the decisions rendered, all of the military judges have now duly considered the impact of the CDS Suspension Order and two of the military judges now share the opinion that there are sufficient guarantees of judicial independence to ensure that an accused's paragraph 11(*d*) *Charter* rights are respected. In light of the extraordinary circumstances that have flowed from the latest round of decisions and the obvious instability that has ensued, in my view the only appropriate forum to address any lingering issues of judicial independence now is the CMAC.

[78] For these reasons, I dismiss the application for me to recuse itself in hearing Bombardier Cogswell's application. However, in light of the very exceptional circumstances surrounding this issue which is rightfully before the CMAC for its consideration early in 2021, in the fairness to the interests of Bombardier Cogswell, the court adjourns the hearing of her *Charter* paragraph 11(*d*) application until such time as the CMAC has rendered its decision on the merits of the issue of judicial independence. As soon as it renders its decision, I will give that application its proper and due consideration.

FOR THESE REASONS, THE COURT:

[79] **DISMISSES** the application for recusal.

Counsel:

Captain D. Sommers, assisting the Director of Defence Counsel Services, Counsel for Bombardier C.H. Cogswell, the Applicant

The Director of Military Prosecutions as represented by Lieutenant-Colonel D.G.J. Martin, Counsel for the Respondent