COURT MARTIAL

Citation: *R. v. Brown*, 2021 CM 4003

Date: 20210323
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Standing Court Martial

Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

Lieutenant(N) C.A.I. Brown, Applicant

- and -

Her Majesty the Queen, Respondent

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

DECISION ON A DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS

(Orally)

Introduction

[1] Lieutenant(N) Brown is appearing before this Standing Court Martial to face two charges laid under section 130 of the *National Defence Act* (*NDA*) for sexual assault and forcible confinement, contrary to section 271 and subsection 279(2) of the *Criminal Code* respectively, in relation to an incident which allegedly occurred on 20 October 2018 on board one of Her Majesty's Canadian ship in Reykjavik, Iceland.

[2] On 2 November 2020, Lieutenant(N) Brown filed this application seeking a stay of proceedings in relation to the charges as a remedy for an alleged violation of his right, as an accused, to be tried by an independent and impartial tribunal as provided at paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms.* The application also seeks that a declaration be made to the effect that only Parliament has the ability to construct a regime that would obviate the issues that it raises, as it pertains to the alleged lack of judicial independence of all military judges on the basis that they can be

charged and dealt with, while in office, under the disciplinary regime applicable to officers under the Code of Service Discipline (CSD). This systemic judicial impartiality issue has been litigated at courts martial since the fall of 2019 and has been the object of numerous judicial decisions, starting with the decision of this military judge in *R. v. Pett*, 2020 CM 4002 (*Pett*).

[3] For a number of reasons that will be outlined shortly, I have decided that this application would be heard at the time and place set for the trial in the convening order, as a question of mixed law and facts in the order of procedure provided for at subparagraph 5(*e*) of the *Queen's Regulations & Orders for the Canadian Forces* article 112.05. The date of the current proceedings was set in an order of the Court, drafted in consultation with counsel. I will now explain as briefly as possible what brought us to this point before outlining what I believe to be the issues, provide my analysis on the basis of the evidence and the position of the parties and, finally, arrive at a decision on the application.

Background

[4] The challenge to the judicial independence of military judges that was initially raised in the fall of 2019 was related to an order made by the Chief of the Defence Staff (CDS) on 2 October 2019, in which a military officer was designated as having the power to lay charges specifically on military judges. Although the challenge was raised on behalf of two accused in two distinct prosecutions, I was the first military judge to rule on the application on 2 December 2019, for written reasons released on 10 January 2020 in the case of *Pett*. I found that the order from the CDS targeting military judges specifically as being subject to be charged and dealt with under the disciplinary regime applicable to officers under the CSD indeed violated judicial independence. I nevertheless carried on with court martial proceedings after declaring the order to be of no force or effect, having expressed my confidence that military authorities would give effect to my findings. My colleague, Sukstorf M.J., rendered a similar decision in the case of the other accused who had raised the same challenge, Corporal D'Amico, about a month later, allowing his trial by General Court Martial to be conducted. (*R. v. D'Amico*, 2020 CM 2002 (*D'Amico*).

[5] When court martial proceedings recommenced in the summer of 2020 following an interruption during the lockdowns imposed in the first wave of the COVID-19 pandemic, the issue of judicial independence of military judges was raised again, especially given that the CDS order impugned in *Pett* and *D'Amico* had been kept in force, contrary to the expectation laid out by both Sukstorf M.J. and myself in our respective decisions. The fact that this order was still in force was criticized in no uncertain terms by my colleague Sukstorf M.J. in a preliminary decision in the matter of Major Bourque (*R. v. Bourque*, 2020 CM 2008), a case which was ultimately settled with a guilty plea and a joint submission for a fine of $200.

[6] In other cases, the application had to be decided and the continued existence in force of the CDS order of October 2019 led d'Auteuil, M.J. to stay the proceedings of

three courts martial in the cases of *R. v. Edwards*, 2020 CM 3006, *R. v. Crépeau*, 2020 CM 3007 and *R. v. Fontaine*, 2020 CM 3008. I followed my colleague's lead to arrive at the same disposition in *R. v. Iredale*, 2020 CM 4011 on 11 September 2020.

[7] It is important to mention, as agreed by counsel in argument, that all three military judges who ruled on that issue agreed to state that the law must be interpreted as preventing military judges in office to be charged and dealt with under the disciplinary process applicable to officers and administered by the Judge Advocate General (JAG), the Director of Military Prosecutions (DMP) and actors of the chain of command in the CSD. The DMP does not agree with that statement of law and immediately appealed the cases of *Edwards*, *Crépeau*, *Fontaine* and *Iredale* to the Court Martial Appeal Court (CMAC). The *Crépeau* decision was cross-appealed by the defence, presumably to argue that the military judge erred in refusing to strike out a number of legislative provisions that allow military judges to be charged and dealt with as officers. The two other military judges who had ruled on the issue had also refused to strike legislative provisions. This is not insignificant. Indeed, the declarations that were made by military judges as a result of their statement of law, to the effect that military judges could not be charged and dealt with, invalidated only the October 2019 CDS order, which specifically targeted military judges by assigning them a commanding officer for matters of discipline. At no time was the legislative and regulatory framework allowing the charging of military judges the object of judicial declarations of invalidity which would have, in effect, severely handicapped the military justice system by compromising some of its key provisions.

[8] On 15 September 2020, the CDS issued an order suspending his October 2019 order pending the final determination of the appeals. Defence counsel renewed their applications, arguing that the defects that threatened the judicial independence of military judges extended beyond the scope of the October 2019 CDS order. Up to that point, the lack of a required action or reaction to the statement of law by military judges, on the part of the Executive, was deemed worthy of sanction or, at least, condemnation by all three military judges who had spoken on the issue. That unanimity was broken when differing opinions from military judges appeared as to whether the action from the CDS constituted a sufficient acknowledgement of the law they had made regarding their liability to be charged and dealt with. A joint hearing was organized by my colleague Sukstorf M.J. and, in the first decision assessing the effect of the suspension of the October 2019 CDS order, she ruled on 23 October 2020 in *R. v. MacPherson et al.*, 2020 CM 2012 that she was satisfied that the law as stated by military judges had been acknowledged by the fact that the only order impugned was no longer in effect, without much analysis of the wording of the suspension order, specifically how this order would be seen by a reasonable informed observed.

[9] I had followed the lead of my colleague Sukstorf M.J. in scheduling a joint hearing of similar judicial independence applications filed in five cases: Sergeant Proulx, Sergeant Cloutier, Leading Seaman Brinton, Captain D'Arcy and Lieutenant(N) Brown, the applicant in this case. As soon as the *MacPherson et al.* written decision was issued, I obtained submissions on whether I was bound to follow my colleague's

lead in disposing of the matter the way she suggested. However, in preparing for a joint hearing planned for 12 November 2020, I came to the conclusion that I was no longer comfortable holding only one hearing in relation to that many convened courts martial, especially given that the dates of trial were spread out in time and that changes in facts were occurring. I decided to hear the applications in succession, starting with Sergeant Proulx on 12 November 2020, as he was scheduled to be tried by a General Court Martial just over a week later.

[10] My concern about the possibility of factual changes that could influence the outcome of these applications turned out to be valid. Less than forty-eight hours before the 12 November hearing, I learned that my colleague d'Auteuil M.J. had rendered a decision in the case of *R. v. Christmas*, 2020 CM 3009 where, on arguments almost identical to those submitted in *MacPherson et al*., he settled on an entirely different outcome, granting the application in part and ordering a stay of proceedings.

[11] Following a hearing, I decided in the case of Sergeant Proulx, on 13 November 2020, to issue a stay of proceedings for essentially the same reasons as in *Christmas* with one notable exception, expressed at paragraph 99 of my written reasons issued on 24 November 2020: I did not see the need to issue a declaration to the effect that Canadian Forces Organisation Order (CFOO) 3763 is of no force or effect as it pertains to paragraph 9 because that provision was clearly not applicable to military judges according to the law set in *Pett*. I stated that doing so would only invite authorities to apply "Band-Aid" solutions to individual symptoms instead of taking concrete steps to acknowledge the disease afflicting the independence of military judges so that the public and accused persons could be assured of the military judges' independence from the executive.

[12] Yet, even before the written reasons in *R. v. Proulx*, 2020 CM 4012 had been released, CFOO 3763 was re-promulgated on 18 November 2020 without paragraph 9, declared null and void in *Christmas*. Subsequently, d'Auteuil M.J. heard and determined a similar application pertaining to judicial independence of military judges in *R. v. Jacques*, 2020 CM 3010. On 4 December 2020, he ruled that he was satisfied that the CDS, in re-promulgating CFOO 3763 without its paragraph 9 which allowed military judges to be charged and dealt with, would be seen as shielding military judges from any interference by the military hierarchy, hence resolving the judicial independence concerns previously identified in *Christmas*.

[13] I subsequently ruled on this issue in the case of *R. v. Cloutier*, 2020 CM 4013. Unfortunately, I could not agree with the conclusion reached by my colleague d'Auteuil M.J. in *Jacques*. I found on 9 December 2020 that military judges were not shielded from disciplinary actions of the Executive as the re-promulgation of a CFOO without the paragraph which used to attribute a chain of command to them did not prevent charges to be laid by the National Investigation Service and dealt with through the chain of command of the unit where they may find themselves in the execution of their duties and, alternatively, a chain of command could be set out for them in a matter of days following any charge laid or even considered. I reiterated what I had previously found

in *Proulx*, namely that only an acknowledgement of the binding nature of the law set 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 fulfil the constitutional principle of independence and impartiality that military judges must enjoy for the benefit of those subject to the CSD.

[14] Therefore, the initial unanimity of military judges on the main issue relating to their judicial independence was broken by mid-December 2020, essentially on the basis of differing opinions from military judges as to whether the law set in *Pett*, with whom every military judge was comfortable, was acknowledged by two legal facts originating from or on behalf of the CDS in the fall of 2020, namely the suspension of a previous CDS order found to have been deficient and the re-promulgation of a CFOO without an impugned paragraph. This left this military judge alone in insisting that the judicial independence of military judges is not sufficiently protected unless and until the law set in *Pett* and since is fully acknowledged by the DMP and the CDS pending a decision of the CMAC on the issue. That concern was laid out at paragraphs 58, 63, 64 and 85 of the *Cloutier* decision.

[15] Since December 2020, two of the five cases where judicial independence applications were filed were the object of agreements for settlement, under the terms of which applications were withdrawn and guilty pleas entered or expected. Indeed, Leading Seaman Brinton withdrew his application and I accepted his guilty plea to one charge on 4 February 2021. As for the second case, I have been informed that Captain D'Arcy intends to plead guilty at a court martial postponed once for operational reasons but now scheduled for 27 April 2021. Therefore, this case involving Lieutenant(N) Brown is the last one left to be disposed where a judicial independence application was filed in November 2020.

[16] Mainly for that reason, I informed parties on 8 February 2021 that I was not considering adjourning the hearing of this application of my own motion as I had done for another case in January, especially considering that other military judges had since decided to move ahead in the conduct or continuation of trials by court martial. However, I stated that I would be prepared to entertain any application for an adjournment by one of the parties. During teleconferences between the parties on 19 February and 12 March 2021, I specifically asked whether there would be any request for adjournment. Both counsel answered in the negative.

[17] A significant preoccupation which could have justified a request for an adjournment is what the prosecution described as an "imminent" decision from the CMAC on the appeals launched as a result of the rulings in the cases of *Edwards*, *Crépeau*, *Fontaine* and *Iredale*, heard by the CMAC on 29 January 2021 and those of *Proulx* and *Cloutier*, heard on 11 March 2021 before the same panel of the CMAC. However, the term "imminent" needs to be qualified: counsel in virtual attendance at these hearings were unable to assess when a decision could be expected. On the basis of this assessment, I determined that the hearing of this application would take place at the last possible moment, namely in the order set for determination of questions of mixed

law and fact at the beginning of the proceedings of this Standing Court Martial, as ordered in the convening order.

[18] For reasons that were laid out in ample details in an order issued by the Court on 12 March 2021, I became concerned in the course of the teleconference with counsel that the acknowledgement of the law offered as a means to ensure that proceedings could possibly go ahead without judicial independence concerns had not been adequately considered by the prosecution, despite having been raised as a possibility in writing in my email to counsel on 8 February 2021, referencing paragraph 85 in *Cloutier*, where I said:

> 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.

[19] In the order issued by the Court on 12 March 2021, the Court took the time to explain at length the reasons for requesting the prosecution to obtain and provide certain information and acknowledgements, including the relevant background and explanations as to its authority to do so. The prosecution complied with the Court's order as shown in three documents entered as exhibits, representing the responses from Lieutenant-Colonel Martin, the Acting CDS (A/CDS) and the DMP respectively.

[20] It is worth noting, before moving on, that the prosecution has changed its views pertaining to an adjournment of the application a day after the order of 12 March 2021 was issued. In an application served the next day, 13 March 2021, the prosecution sought an adjournment of the hearing of the application, which implied an adjournment of the trial and of its obligation to comply with the order. I heard this application late in the afternoon of Sunday, 14 March 2021, at the Asticou Centre courtroom. I dismissed the application for adjournment later in the evening in short reasons, having concluded that granting an adjournment at that late stage was not in the interest of justice for a number of reasons, including the fact that it would be seen as an attempt to frustrate the purpose of the court order and would deny the applicant a hearing he had been expecting since November 2020 when he filed the present application.

Issues

[21] There are two essential issues to be determined in this and for each judicial independence application, namely whether the continuation of proceedings involving the applicant is a breach of his rights protected by paragraph 11(*d*) of the *Charter*. If it is the case, then the issue becomes: What remedy is warranted?

[22] As it pertains to the first issue, of the existence of a breach, both parties have stated that the analysis of the Court would likely start with what was decided in *Cloutier*. I agree. The issue therefore becomes whether there are new facts from the response by the DMP and/or the A/CDS to the 12 March 2021 court order that would justify disposing of this application any differently than as done in *Cloutier* where I had

stated, at paragraph 63, that "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."

[23] As for the appropriate remedy, the *Cloutier* decision also constitutes an interesting starting point to the analysis because, of all of the recent court martial decisions on judicial independence where a breach has been found, it is the only occasion where a termination of proceedings was selected as the preferred remedy. The issue is whether, in today's circumstances, the more frequently imposed remedy of a stay of proceedings should be adopted instead.

Position of the parties

Applicant

[24] The applicant submits that the conclusion arrived at in *Cloutier*, as it pertains to the existence of a breach of the rights of the applicant under paragraph 11(*d*) of the *Charter*, is still entirely valid, given that the evidence obtained since does not support a different conclusion. The applicant submits that the information obtained from the A/CDS does not constitute the required acknowledgement from the chain of command that military judges cannot be charged and dealt with as officers under the disciplinary regime of the CSD administered by the executive. As for the statement from the DMP, it is submitted that it expresses an intention or a choice not to expose military judges to be charged and tried by court martial pending a decision by the CMAC on the issue of judicial independence. As such, it expresses an intention not to do something that could, in law, be done, hence falling short of meeting the required acknowledgement on the binding nature of the law stated by military judges to the effect that they are shielded from such action. Consequently, the current situation cannot possibly satisfy a reasonable observer that military judges have obtained the required guarantees of judicial impartiality which would allow them to be perceived as independent and impartial.

[25] On the basis of these arguments, the applicant requests that the proceedings of this court martial be stayed under subsection 24(1) of the *Charter*, this remedy constituting the only appropriate outcome in the circumstances.

Respondent

[26] For its part, the respondent submits that the new evidence, although short of the specific acknowledgement requested in the 12 March 2021 court order, is nevertheless sufficient for the Court to conclude that military judges are shielded from liability under the disciplinary regime applicable to officers, pending an upcoming decision from the CMAC. It is submitted that this evidence reveals a sufficient acknowledgement of the law set by military judges in precedent decisions to the effect that they are not liable to

be charged and dealt with as officers by members of the executive while holding the office of military judge.

[27] The respondent submits that should a violation of paragraph 11(*d*) of the *Charter* be found, a stay of proceedings would not be warranted to remedy the violation. Rather, a termination of proceedings would allow a more expeditious continuation of the prosecution once the CMAC confirms, as the prosecution expects, that there are no judicial independence deficiencies facing the military judiciary.

Evidence

[28] A number of exhibits were filed jointly by the parties, consisting very much of the same exhibits produced in similar applications, with the addition of the 12 March 2021 order by the Court and the three written responses received as a result, from counsel for the respondent, the A/CDS and the DMP respectively. A copy of the 8 February 2021 email sent to counsel on behalf of the Court was also introduced in evidence. Finally, a copy of an email exchange on 15 November 2020 which indicates that the then-CDS had given direction for the re-promulgation of CFOO 3763 without paragraph 9 was provided. That information, not shared at the *Cloutier* hearing, was consequently unknown to me when I questioned, in my subsequent reasons, whether the CDS was even aware of the re-promulgation of the CFOO. That said, this was one of a number of elements considered in reaching my conclusion in *Cloutier* on the difficulty of transferring intent associated with the CFOO to the previously issued suspension order. As agreed by parties, it was not determinative of the outcome in *Cloutier* and it is not a determinant factor in relation to the current application.

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

Analysis

Introduction

[30] Despite this somewhat lengthy background, the issues pertaining to this application, at this stage of the overall debate, can be resolved relatively simply, especially in light of the 12 March 2021 order and the responses obtained as a result.

The 12 March 2021 Order

[31] As explained in providing the background to this application, the 12 March 2021 order highlights in great detail the reasons why it was made. By providing an opportunity for confirmation of the views of the persons occupying the offices of CDS and DMP, the order could not only provide a way ahead to allow the trial of Lieutenant(N) Brown on serious charges to proceed if the requested acknowledgements

were obtained, but also allowed clarification on issues that have not been clear since the suspension order was issued by the CDS on 15 September 2020, a lack of clarity which was the source of disagreement and differing results at courts martial.

[32] The order required that the officer holding the office of CDS be given a copy of the order as well as of the decision in *Cloutier* and be informed that he could lift a barrier for proceeding with the trial of Lieutenant(N) Brown by issuing an acknowledgement to the effect that the holder of the office of CDS, subordinate commanders and commanding officers are bound by the law set by military judges, until the CMAC rules otherwise, to the effect that military judges in office cannot be charged and dealt with under the disciplinary process applicable to officers and administered by the JAG, DMP and actors of the chain of command in the CSD. That acknowledgement is very much in line with what has been described as a requirement in several paragraphs in *Cloutier*, notably at paragraphs 58, 63, 64 and 85, as mentioned in the order. The very precise nature of the acknowledgement was in line with a recommendation formulated by counsel for the prosecution, at a teleconference on 12 March 2021.

[33] The order also requested confirmation from the current holder of the office of DMP that he was prepared to issue an acknowledgement in the same wording as requested from the CDS, again pending the decision of the CMAC.

[34] The answers received were not in line with what had been requested and require further analysis.

Reply of the A/CDS

[35] In a reply evidently prepared by a legal advisor from the office of the JAG which advises the CDS in matters of military law as provided for at section 9.1 of the *NDA*, Lieutenant-General Eyre signed a letter providing as follows:

> "I acknowledge having been informed of the order of military judge Cdr Pelletier, dated 12 March 2021, in the matter of *R v Brown* (docket: 201942) as well as the decision of the court martial in *R v Cloutier*.
>
> As that decision is subject to a pending appeal before the Court Martial Appeal Court of Canada, I have no further comment at this time."

[36] The applicant submits that this response is obviously not what was required in the order and in the decision in *Cloutier*. I agree. Yet the issue is not so much *Cloutier* as it is the acknowledgement of the law set by military judges since *Pett* in January 2020, the *Cloutier* decision not even being mentioned in the requested acknowledgement spelled out in the order. In reducing the issue to *Cloutier*, legal advisors to the A/CDS are attempting to turn the attention away from what was in the order and has been requested all along, namely an acknowledgement of the law that would provide a way ahead for the continuation of trials by court martial separate from

the appeals that had been initiated by the prosecution, in the exercise of an entirely valid discretion. I note that the same mechanism was employed in the wording of the suspension order of 15 September 2020 which carefully avoided the central issue of the extent of the liability of military judges as officers under the CSD to focus instead on the consequences of the decisions of military judges in ordering stays of proceedings and the need to prevent them from continuing to do so pending a determination of the appeals.

[37] The respondent alleges that the response indicates that the person currently occupying the office of CDS is aware of the state of affairs as it pertains to the debate on the judicial independence of military judges, hence of the risks that would be involved in drafting any order allowing charges against military judges to be pursued at this time.

[38] It may be so, but such risks were no doubt present the last time charges were considered against a military judge, as evidenced by a statement from the JAG as to the challenges that such charges laid against the former Chief Military Judge Dutil presented. Yet, that risk was accepted. Orders were drafted, charges were laid, referred, preferred and pursued in court martial against a military judge with very unsatisfactory results, as evidenced by the decision of the Federal Court in the matter of *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330 and the subsequent abandonment of the prosecution. This incident, at the source of the October 2019 CDS order and the current challenge to the independence of military judges, shows that awareness of legal risks does not guarantee that authorities will not engage in a given course of action. Awareness of legal risks can in no way offer reassurance to a reasonably informed observer that a court is sufficiently protected from such action as to offer the required guarantees of judicial impartiality required by paragraph 11(*d*) of the *Charter*.

[39] I find that the CDS, in referring to the appeal process going its course in *Cloutier*, is signalling that the refusal to issue the requested acknowledgement is because *Cloutier* is not being accepted as valid law. The order and the response reveal that it is his decision, taken with the benefit of legal advice, and that it has been thought out. I respect it as I must, pointing out that the 12 March 2021 order requested whether a specific acknowledgement could be made, not that it was required to be made.

[40] As it pertains to the argument of the respondent questioning whether it is consistent with judicial independence for a court to request an acknowledgement by the executive, it is important to remember the context of the order and of the current application. At the outset of the judicial independence litigation initiated by defence counsel, not the military judges, a compromise was offered in that courts would continue to function after declaring the October 2019 CDS Order to be of no force or effect, on the assumption that such an exceptional declaration would be followed by consequent action from the CDS as representative of the executive, an expectation that was clearly laid out in the concluding paragraphs 146 and 147 of *Pett*, quoted by the two other military judges who agreed with this outcome subsequently. What happened

after was silence and inaction on the part of the executive, resulting in statements condemning that state of affairs by the three military judges who spoke on the issue, and stays of proceedings. The suspension order on 15 September 2020 was a response to the stays that had been imposed, yet its inherent ambiguity caused military judges to split on the question of whether the law had been sufficiently acknowledged. A subsequent action by the CDS in having the CFOO reissued caused another split amongst military judges, again, on the sufficiency of that measure.

[41] In that context, I find there is absolutely nothing wrong for the Court seeking clarification from the CDS, given that the dialogue had already been ongoing for well over one year, as evidenced by the wording of the suspension order of 15 September 2020 and the email of 15 November 2020 confirming the inference that the CFOO 3763 had been reissued as a result of the court martial decision in *Christmas*. In fact, there is nothing inherently wrong or suspicious in a dialogue between the judiciary and the executive or legislative branches. Such dialogue has been ongoing for months on the not insignificant issue of medically assisted dying and is often at play to some extent when a court provides a delay to correct legislation found to be constitutionally defective.

[42] As mentioned previously, the reply from the A/CDS was no doubt submitted by legal advisors for signature and concerned an issue charged with legal subtleties. However, it remains that when being offered a clear path that would potentially allow this trial on serious allegations of sexual misconduct to move ahead, the choice that has been made is to revert to unclear language that generated and will likely continue to perpetuate confusion in the foreseeable future.

Reply of the DMP

[43] As for the DMP's response, it was encapsulated in a statement which reads as follows:

> "The DMP respects the rule of law. The DMP acknowledges the various courts martial decisions regarding the independence of military judges, including: *R v Pett*, *R v D'Amico*, *R v Edwards*, *R v Crépeau*, *R v Iredale*, *R v Christmas*, *R v Jacques*, *R v Proulx*, *R v Cloutier*, *R v MacPherson et al* and *R v Pépin*. The DMP continues to act in accordance with the law in the exercise of his legal duties. While the issue of the independence of the military judges is under appeal, the DMP will not recommend the laying of charges, nor prefer charges for court martial, against a military judge."

[44] I agree with the applicant's submission that this statement reveals, in the words "the DMP will not" that the DMP does not intend, at the current time, to recommend the laying or preferral of charges against a military judge. This is different from a statement to the effect that the law set by military judges is binding. In fact, by linking the current position of the DMP to the ongoing appeals, the statement by the DMP is essentially to the effect that the requested acknowledgement cannot be offered as the decisions being appealed are not recognized as valid, binding law.

[45] Counsel for the respondent acknowledged as much in pointing to recent jurisprudence confirming in his view that decisions at first instance are not binding on prosecutorial authorities who can go against them without committing abuse of process. Without stating any opinion on the accuracy of that submission, it remains that it is beside the point. The issue here is whether the DMP would agree to make a statement to the effect that the law set by all military judges is binding, in order to allow prosecutions to continue to trial pending a CMAC decision. It is not whether the refusal to do so would constitute an abuse of process. The decision by the DMP not to make a statement to that effect means that a step that has been deemed essential for the pursuit of this court martial is not being taken, nothing more, and nothing less.

[46] However, it remains that in stating that the DMP has decided that military judges would not be prosecuted, the DMP has effectively restated his authority over military judges in office. That is exactly what applicants have been stating is contrary to the requirements of judicial independence from day one in the fall of 2019. All military judges who ruled on the issue in 2020 found that argument to be compelling and issued rulings accordingly.

[47] I do not disagree with the argument that an acknowledgement to the effect that military judges are independent because the law prohibits charges to be laid and processed against them for court martial may be imperfect. However, in the context of the ongoing litigation on the broader judicial independence of military judges since 2019, the complexity of the issue and the sensitivity that judicial officials must have regarding the efficiency of the justice system in which they operate, I believe the solution proffered in *Pett* and subsequent cases was an acceptable compromise which provided a way ahead for trials to continue, even if the responsibility for making the system work does not rest on the shoulders of military judges. In any event, I prefer this solution to one where military judges are effectively stating that they are independent because they say they are, especially when the DMP's position has continuously been against interpreting the law in a manner which would support this viewpoint. That is so even if the DMP states that he is magnanimous enough to not prosecute military judges until the law is clarified. As stated on two occasions in *Cloutier*, the presumption that prosecutorial discretion will be exercised in a certain way in good faith cannot possibly constitute a sufficient protection of the fundamental rights of the accused, in a situation where those are threatened by a systemic issue.

[48] It is not that respondent's counsel submission to the effect that no DMP would ever consider going ahead with the prosecution of a military judge in the current context is entirely insignificant. However, this statement is easier to make when, currently, there are no complaints nor investigations seemingly targeting a military judge, at least to the knowledge of the prosecutors appearing in this case. As demonstrated with the sudden change in the prosecution's position on the opportunity to adjourn this application, views may change. Consequently, there is little in such a statement to offer sufficient reassurance to a reasonably informed observer that a court benefits from the required guarantee of judicial impartiality that paragraph 11(*d*) of the *Charter* demands. Indeed, what the applicant is seeking is not to be tried by a judge who is subject to the

magnanimity of a military prosecutor, but rather by a judge free from any opinion or position of a military prosecutor.

Conclusion

[49] I conclude therefore that Lieutenant(N) Brown's rights 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 this court martial. The respondent failed to provide any justification under section 1 of the *Charter* for this violation.

[50] In closing on the issue of the breach, I wish to comment on the information provided by the prosecutor at the very end of the hearing, to the effect that my colleague, d'Auteuil M.J., decided yesterday, 22 March 2021, to dismiss a similar judicial independence application by defence for a stay of proceedings of a trial by General Court Martial, thereby allowing the trial on charges alleging sexual misconduct to go ahead here in Halifax.

[51] I asked whether the evidence obtained as a result of the 12 March 2021 order in this file had been produced by counsel for the accused, who is associated as in this case with the Director of Defence Counsel Services. I was told that it had not been. In light of that, I am not surprised that my colleague would have maintained the position he had taken in the matter of *Jacques* and subsequently in the matter of *R. v. Pépin*, 2021 CM 3005. That being said, it is proper to wonder whether the reply by the A/CDS could have changed the observations made at paragraphs 81 and 82 of *Jacques* as it pertains to the recognition by the executive of the current law pertaining to the liability of military judges under the CSD. That said, I will certainly not speculate on this issue nor should my remark be interpreted in any way as questioning the actions of defence counsel who has apparently decided not to introduce that evidence, if it was shared with him. Indeed, it would be natural for a defence counsel, confident of the value of the arguments of judicial independence submitted to the CMAC, to assess positively the chances of success. After all, the defence is respondent in most of those appeals. Defence counsel could consequently be comfortable with pursuing a much better result for his or her client in the form of an acquittal by the panel of a General Court Martial, especially when the trial is being run at no cost for the accused.

[52] This is not to say that I would be entirely comfortable going ahead with a trial if I were to dismiss a similar stay application in the future. Given that the issue of the independence of the military judges is in deliberations at the CMAC, I may be hesitant to engage the expense of significant public funds for running a trial which may be subsequently declared a nullity, especially if it necessitates placing victims of serious crimes in a position of having to testify about delicate and hurtful events. I have ordered the trial in the matter of Lieutenant-Colonel Mainguy to be postponed until the CMAC has rendered its decision, in an order issued on 22 January 2021 and attached to the 8 February 2021 email sent to counsel. The present case has been assessed as worthy of a different outcome in my decision on the application for adjournment by the

prosecution, given differences in the facts, especially the initial date foreseen for a hearing of the application on 12 November 2020.

Remedy

[53] As mentioned at the outset, the issue of remedy, not unlike the other issues associated with this file, is one where the analysis must start with the *Cloutier* decision because it is the only decision where the remedy proposed by the respondent, a termination of proceedings, was selected as the preferred remedy over a stay.

[54] The following were my relevant words, in the operative paragraphs of *Cloutier*:

> [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.

[55] It is appropriate to clarify at the outset that there is no abundance of remedies for the situation I am confronted with in this case, given the nature of the application. Indeed, the remedy chosen must be tangible for the applicant, yet not excessive. However, having recognized a breach of the right to be tried by an independent and impartial tribunal, especially one that can no longer, at this stage, be remedied by a simple declaration as outlined previously, it is obvious that a continuation of these proceedings would aggravate the breach.

[56] The remedy must therefore stop the proceedings from continuing. An adjournment is not an adequate remedy as it leaves the applicant in the same position as he was prior to being brought to appear at these proceedings, while potentially jeopardizing his right to be tried within a reasonable time. A recusal is not an acceptable solution as it would essentially have the same effect as an adjournment. Wisely, counsel have not proposed in submissions that these two potential remedies, explored in earlier similar cases, were in any way relevant in the circumstances of this case. They have

instead effectively reduced the debate as a choice between a termination and stay of proceedings.

[57] I have to say that these two options are very similar, as demonstrated by the fact that they are dealt with together under one ground of appeal by or on behalf of the Minister in paragraph 230.1(d) of the *NDA*. Consequently, these two remedies being so close, the distinction between them is not a matter of exact science or elaborated analysis.

[58] The extract from *Cloutier*, quoted above, is to the effect that remedy of the termination of proceedings was preferred mainly because of recent action from the CDS in direct response to the *Christmas* decision which had been subsequently considered adequate in *Jacques*, a finding that I could not ignore when considering the positive steps taken by the then CDS to arrive at a resolution, even if, from my point of view, it was not sufficient.

[59] That said, termination of proceedings was imposed instead of a stay in *Cloutier* in the stated hope that a positive response would be obtained from the executive to make it possible for cases scheduled subsequently to be brought forward to a final determination on the charges. At the time, I was hopeful that such a resolution could be reached. I had assessed the sufficiency of the executive's response on the basis of a failure to meet what I considered to be the executive's burden to demonstrate that it fully acknowledged the law as stated by military judges, pertaining to the extent of their liability as officers under the CSD. The situation is entirely different today. In my opinion, the response of key members of the executive to the 12 March 2021 order is to the effect that they do not intend to provide the acknowledgement requested. There is no longer any doubts about that.

[60] Consequently, I have concluded that the Court must distance itself from what has occurred in relation to the current application since it has been filed on 2 November 2020. The only way to do this is by imposing the most severe remedy of a stay of proceedings. I find that the concerns expressed as to the practical effect of this remedy as opposed to a termination are negligible.

[61] Defence counsel was offered an opportunity to comment on the assertion of the prosecution to the effect that a termination would be more beneficial to the accused. Counsel insisted in requesting a stay. I tend to confer greater weight to the assessment of defence counsel on where the interest of an accused lies. The concerns about the possibility that the transfer of this case to civilian prosecutors be facilitated by a termination are in my view speculative, given that counsel for the prosecution has not been able to confirm whether there has been any interest from a civilian prosecution service to take on this case. In any event, the final resolution of a case on appeal, even several years after trial, does not preclude a final determination by a civilian court subsequently. This is exemplified by recent news report to the effect that Warrant Officer (Retired) Gagnon is expected to plead guilty in civilian court in Quebec in the next few days. He had been initially acquitted by the panel of a General Court Martial

in 2014, an acquittal set aside by a majority decision of the CMAC (*R. v. Gagnon*, 2017 CMAC 1), subsequently confirmed by the Supreme Court of Canada (*R. v. Gagnon*, 2018 SCC 41).

[62] I believe a stay of proceedings is a sufficient remedy for the breach of Lieutenant(N) Brown's 11(*d*) rights under the *Charter* without any requirement for a declaration to the effect that only Parliament can construct an adequate regime to obviate the issues raised in the applicant's application, despite the request to that effect formulated by the applicant in his written arguments. I have not been convinced that the Court can make such a declaration.

FOR ALL THESE REASONS, THE COURT:

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

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

[65] **DIRECTS**, pursuant to subsection 24(1) of the *Charter*, a stay of the proceedings of this Standing Court Martial.

Counsel :

Lieutenant-Colonel A. Bolik and Lieutenant-Commander F. Gonsalves, Defence Counsel Services, Counsel for the applicant, Lieutenant(N) C.A.I. Brown

The Director of Military Prosecutions as represented by Lieutenant-Colonel D.G.J. Martin and Major M.L.P.P. Germain, Counsel for the respondent