COURT MARTIAL

Citation: *R. v. Levesque,* 2022 CM 2007

Date: 20220317
Docket: 202128

General Court Martial

Bay Street Armoury
Victoria, British Columbia, Canada

Between:

Petty Officer, 1st Class J.R. Levesque (retired), Applicant

-and-

Her Majesty the Queen, Respondent

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

DECISION ON A MOTION SEEKING A REMEDY FOR A VIOLATION OF PARAGRAPH 11(d) OF *CHARTER*

(Orally)

Introduction

[1] On 23 March 2021, the Director of Military Prosecutions (DMP) preferred three charges against Petty Officer, 1st Class Levesque (retired) for offences which allegedly occurred between 1 June and 31 July 2006 aboard Her Majesty's Canadian Ship (HMCS) *Oriole*, in the coastal waters of British Columbia. The first charge alleges sexual assault, the second charge alleges assault and the third charge alleges uttering a threat to cause bodily harm, all against the same complainant.

[2] Petty Officer, 1st Class Levesque (retired) is the applicant and seeks a declaration that being tried for the above charges within the military justice system violates his right to be tried by an impartial tribunal as guaranteed by paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*. As a remedy, he seeks a stay of proceedings pursuant to section 24 of the *Charter.*

[3] Prior to hearing this application, I dismissed the prosecution's motion to summarily dismiss the application of the defendant. The reason was I found the issues raised by the defence were in fact different than those addressed by the Court Martial Appeal Court (CMAC) in the cases of *R. v. Edwards*; *R. v. Crépeau*; *R. v. Fontaine*; *R. v. Iredale, 2021 CMAC 2* (*Edwards*) *and R. v. Proulx*; *R. v. Cloutier, 2021 CMAC 3*, (*Proulx*) which dealt directly with the issue of the independence of military judges given their dual role as serving officers in the Canadian Armed Forces (CAF) and judges. The consistent theme in the *Edwards* and *Proulx* appeals addressed by the CMAC was whether a military judge, who could be prosecuted for an offence under the *National Defence Act* (*NDA),* was independent and impartial.

[4] Conversely, in this application, the applicant argues that due to a loss of public confidence in the military justice system, a court martial is not perceived as an impartial tribunal to try an accused person for allegations of sexual assault.

Position of applicant

[5] The genesis of the applicant's argument is that paragraph 11(d) of the *Charter* requires courts martial to not only be impartial but they must also be reasonably perceived to be independent. He relies upon paragraph 22 of *Valente v. The Queen*, [1985] 2 S.C.R. 673 which reads as follows:

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

[6] He submits that a tribunal that lacks the confidence of the public is not a tribunal perceived to be impartial, as stated in *R. v. Lippé*, [1991] 2 S.C.R. 114, at page 114:

> If a judicial system loses the respect of the public, it has lost its efficacy. As Proulx J.A. expressed in his judgment below, public confidence in the system of justice is crucial to its continued existence and proper functioning.

[7] In short, the applicant argues that due to the nature of the charges before the Court, which includes sexual assault, and the loss of confidence by the public in the military justice system's ability to try sexual assault, the system has lost its efficacy and is not perceived by the public to be impartial.

Position of the respondent

[8] In response to the application, the prosecution originally filed a notice of motion to summarily dismiss the above application. Relying upon the CMAC decision in

Edwards and Proulx, it was his position that the applicant's argument was entirely been rejected by the CMAC.

[9] In *Edwards*, the CMAC held, rejecting the arguments of the applicants that:

> An informed person, viewing the matter realistically and practically—and having thought the matter through could, in our respectful view, reach no other conclusion than military judges meet the minimum constitutional norms of impartiality and independence as required by section 11(*d*) of the *Charter*.
> [My emphasis.]

[10] The prosecution further argued that the decisions in *Edwards* and *Proulx* are binding on this Court and that the applicant's assertions are nothing more than mere speculation.

[11] Once the Court decided that the issues raised by the applicant were sufficiently different than those considered by the CMAC in *Edwards* and *Proulx*, the prosecution replied as follows:

(a) the applicant has failed to provide clear, convincing and cogent evidence that his *Charter* rights have been infringed;

(b) from the public perspective, the applicant has not proven that there is a reasonable apprehension of bias. Impartiality is a real thing which has been extensively litigated in the courts;

(c) all the evidence before the Court today hinges on "Recommendation #68" of the Fish Report, which raised concerns regarding the treatment of complainants, not the treatment of accused persons. All the evidence surrounds one specific factor being the rights of complainants;

(d) there is no suggestion, tangential or otherwise, that the military judge decision making apparatus is in any way bias with respect to accused persons;

(e) the CMAC in *Edwards* and *Proulx* has already confirmed that the judiciary of this Court and the military justice system is unquestionably impartial; and

(f) there is no evidence filed by the applicant that the military justice decision making apparatus is biased.

Law

[12] Paragraph 11(d) of the *Charter* relates only to the rights of a person charged with an offence and reads as follows:

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

[13] In *Edwards*, the CMAC wrote:

> [74] The Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75 and *Committee for Justice and Liberty* instructs us that the assessment of institutional independence and impartiality is both objective and contextual. This requires a consideration of the role and functions being performed by the courts martial, the principles which underlie the military justice system and other factors that bear on the institutional independence of the courts martial and the impartiality of its judges. Those factors include, but are not limited to, the oath of office, statutory protections on the tenure of judges, their remuneration, the conventions governing the exercise of prosecutorial discretion and the extent to which our Westminster model of constitutional democracy permits members of the judicial branch to perform executive functions.

[14] In *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012 (*MacPherson et al.*), I summarized the law related to paragraph 11(d) of the *Charter*. *Valente* is considered the seminal case on the examination of violations of paragraph 11(d) of the *Charter* and it is important to note that Le Dain, J. clarified that "independence" and "impartiality", which are both found in section 11(d) of the *Charter*, are separate and distinct values or requirements:

> [29] In its first post-*Charter* stance on the issue, in the case of *Valente*, the court significantly amplified its earlier guidance. Although *Valente* does not relate to military justice, it is the seminal case. Writing for a unanimous SCC, Le Dain J. defined the content of the right of paragraph 11(*d*) of the *Charter* by drawing a firm line distinguishing between the concepts of independence and impartiality. Justice Le Dain explained that "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case." Whereas, he described independence, as a reference to the "status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees".
> [Footnotes omitted.]

[15] Judicial independence involves an assessment of both individual and institutional relationships. In practice, the two terms are most often used together, but they are indeed distinct. Importantly, judicial independence serves to safeguard impartiality. Both concepts are necessary to promote public confidence in the military justice system. In responding to the *Edwards* case, the CMAC addressed the issue of judicial independence directly with its analysis on the status of the military judges both individually and institutionally, while serving within the fabric of the CAF and presiding over courts martial within a military justice system.

[16] In this case, the applicant challenges the alleged impartiality of the military justice system to try the offence of sexual assault. If I was to apply the analysis of Le Dain J, the issues raised in this application are those of impartiality, which arguably fall

within what Le Dain J. referred to as the attitude of the tribunal in relation to the "issue" of sexual assault.

[17] On 23 July 2015 the *Canadian Victims Bill of Rights* (*CVBR*) came into force. The *CVBR* provides rights to victims of crime to seek information, protection, participation and the right to seek restitution. Section 18(3) of *CVBR* stipulates that it does not apply to service offences that are investigated or proceeded with under the *NDA*.

[18] Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts* included a statutory "Declaration of Victims Rights" (DVR), designed to be incorporated within the *NDA*. Bill C-77 received Royal Assent on 21 June 2019, but most of its provisions would not come into force until a day or days to be fixed by order of the Governor in Council. Although military judges exercise their discretion in the court martial process to ensure victims' rights are granted on par with the *CVBR*, as of the date of this decision most of the provisions related to the DVR are still not in force within the *NDA*. When implemented, the DVR will give victims of service offences, defined as offences in the *NDA* (other than service infractions), or in the *Criminal Code*, or in any other Act of Parliament that are committed by a person subject to the Code of Service Discipline (CSD), rights to information, protection, participation and restitution that substantially mirror the rights afforded to victims in the *CVBR*.

The test

[19] In order to challenge the impartiality of the court martial for the purpose of paragraph 11(d), the applicant does not need to prove an actual lack of impartiality. The question to be answered is whether an informed and reasonable person would perceive the court martial as impartial.

[20] The informed and reasonable person test has been phrased in a number of different ways, but it is clearly an objective test. In *Lippé*, the Supreme Court of Canada (SCC) concluded that the test for both "independence" and "impartiality" is that of an informed person viewing the matter realistically and practically, and having thought the matter through. In *Regina v. Valente (No. 2)*, 41 O.R. (2d) 187, Howland C.J. of the Ontario Court of Appeal defined the test more practically, describing the reasonable person as one who is informed of the relevant statutory provisions, their historical background, and the traditions surrounding them, and after viewing the matter realistically and practically.

Summary of evidence

[21] On 5 November 2020, pursuant to section 273.601 of the *NDA*, the Minister of National Defence (MND) initiated an independent review of the provisions enumerated in subsection 273.601(1) of the *NDA*. Honourable Morris J. Fish was appointed as the Independent Review Authority (IRA).

[22] In examining the position of the applicant with respect to the offence of sexual assault, I reviewed the various documents entered into evidence beginning with the Report of the Third IRA to the MND prepared by the Honourable Morris J. Fish, C.C., Q.C. dated 30 April 2021 (Fish Report). The Fish Report was tabled in Parliament in June 2021.

[23] At paragraph 487, the Fish Report recognized that:

> "487. Sexual misconduct in the Canadian Armed Forces ("CAF") remains persistent, preoccupying and widespread – despite the CAF's repeated attempts to address the problem and to curb its prevalence. It has had a traumatic impact on the lives and careers of victims a corrosive effect on discipline and morale, and a marked tendency to undermine public confidence in the CAF's institutional capacity to solve the problem internally. It is plainly inimical as well to the CAF's intention, as a matter of policy, to "*focus on increasing diversity and gender balance*" within its ranks."
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> [Footnotes omitted; emphasis in italics and bold-face in original; my emphasis here underlined.]

[24] Later at paragraph 514, Fish J. addresses the offence of sexual assault directly:

> "514. Several of the experts and CAF members I interviewed contended that the CAF should not have jurisdiction over sexual assaults. Without expressing a decided opinion in this regard, one expert, Professor Elaine Craig, identified several reasons for prosecuting sexual assaults in the civilian system. And she argued that if the CAF were to retain jurisdiction over sexual assaults, the *NDA* should be amended to track changes in the *Criminal Code* regarding sexual offences.
>
> 515. Upon reflection, I am not persuaded that Parliament should withdraw military jurisdiction over sexual assaults at this time. For one thing, in enacting Bill C-77 in the aftermath of the Deschamps Report, Parliament decided to afford victims the same rights in both military and civilian proceedings. Giving effect to that legislative choice requires implementation as soon as possible of the relevant provisions of Bill C-77.
>
> 516. In addition, some rights and protections afforded by the *Criminal Code* to victims and to persons accused of sexual offences are not included in the *NDA*. While I am informed that some at least are, in practice, applied at courts martial, I think it preferable that *all* the rights and protections available in the civilian justice system be *expressly* incorporated into the *NDA*."

> 517. Finally, unless the victim consents, it would in my view be inappropriate for the military justice system to continue to investigate or prosecute alleged sexual assaults until it extends to all victims the protections afforded by the DVR. The civilian authorities should, in the intervening period, exercise their own investigative and prosecutorial jurisdiction over alleged sexual assaults."
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> [Footnotes omitted; emphasis in italics in original.]

[25] Following the above comments, the Fish Report makes Recommendation #68(a):

> "Recommendation #68. The *Declaration of Victims Rights* should be brought into force as soon as possible, ensuring that victims investigated or prosecuted under the *National Defence Act* will be entitled to substantially the same protections as the *Canadian Victims Bill of Rights* affords. Until the *Declaration of Victims Rights* comes into force, and unless the victim consents:
>
> (a) sexual assaults should not be investigated or prosecuted under the *National Defence Act* and should instead be referred to civilian authorities; and
>
> (b) there should also be a strong presumption against investigating and prosecuting under the *National Defence Act* other offences committed against a victim.
>
> Moreover, the *National Defence Act* should be amended to expressly incorporate, in substance, the rights and protections afforded by the *Criminal Code* to victims and to persons accused of sexual offences."

[26] It is clear from the wording of Recommendation #68 (a), that the Fish Report recommends all sexual assault investigations and prosecutions be forwarded to civilian authorities, but importantly, it qualifies the recommendation with a temporal limit being until the DVR comes into force, and unless the victim consents. In other words, this recommendation was focused on the prioritization of victims' rights until the legislative gap with respect to victims' rights in the *NDA* is cured.

[27] Prior to the Fish Report being finalized, allegations of historical sexual misconduct were raised against a number of general officers and flag officers (GOFOs), including both the former and the appointed Chief of the Defence Staff at the time. In the media aftermath, survivors continued to come forward raising additional allegations against additional GOFOs.

[28] On 29 April 2021, prior to the Fish Report being tabled in Parliament, the Honourable Harjit S. Sajjan, MND announced the launch of an independent external comprehensive review to be led by the Honourable Louise Arbour, C.C., G.O.Q. Her terms of reference requested that she review the current policies, procedures, programs, practices, and culture within the CAF and the Department of National Defence (DND). The aim of the review was intended to "shed light on the causes for the continued presence of harassment and sexual misconduct despite efforts to eradicate it, identify barriers to reporting inappropriate behaviour and to assess the adequacy of the response when reports are made, and to make recommendations on preventing and eradicating harassment and sexual misconduct." (see *Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces: Terms of Reference*: Purpose)

[29] The recurrent allegations of historical sexual misconduct against senior CAF leaders and their related Canadian Forces National Investigation Service (CFNIS) investigations led Arbour J. to conclude that immediate remedial actions were necessary to start restoring trust in the CAF. On 20 October 2021, On behalf of the Independent Comprehensive External Review Team, Arbour J. issued interim recommendations in a letter to the MND. The first of the interim recommendations requested that Recommendation #68 of the Fish Report be implemented immediately:

> "Without prejudice to my Final Report and additional findings and recommendations, I recommend, on an interim basis, the following:
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> 1. The Honourable Morris J. Fish's recommendation No. 68 should be implemented immediately. All sexual assaults and other criminal offences of a sexual nature under the *Criminal Code*, including historical sexual offences, alleged to have been perpetrated by a CAF member, past or present ("sexual offences") should be referred to civilian authorities. Consequently, starting immediately, the Canadian Forces Provost Marshal (CFPM) should transfer to civilian police forces all allegations of sexual offences, including allegations currently under investigation by the CFNIS, unless such investigation is near completion. In any event, in all cases charges should be laid in civilian court.
>
>   Correspondingly, civilian authorities should exercise investigative and prosecutorial jurisdiction over all sexual offences by CAF members. Should civilian authorities decline to proceed, the matter should be returned to the CAF to determine whether disciplinary action is desirable under the *National Defence Act*."

[30] On 3 November 2021, in response to the Arbour recommendations, the newly appointed MND, the Honourable Anita Anand, PC, MP responded as follows:

> "I share your concerns and agree that it is necessary to establish a process that will facilitate the handling of allegations of sexual offences in an independent and transparent way outside of the CAF and the military justice system.
>
> . . .
>
> [I] very much believe that a comprehensive approach to addressing sexual harassment and misconduct in the CAF is necessary for the CAF to live up to its stated values and the expectations of Canadians. I am pleased, therefore to accept your interim recommendations and to inform you that the Defence Team will begin work immediately to implement them. This process will include the implementation of the Honourable Morris J. Fish's recommendation No. 68. In particular, all sexual assaults and other criminal offences of a sexual nature under the *Criminal Code*, including historical sexual offences, alleged to have been perpetrated by a CAF member past or present, will be referred to civilian authorities."
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> [My emphasis.]

[31] On 5 November 2021, two days after the MND issued her response, the Canadian Forces Provost Marshal and the DMP issued a joint statement:

> "4. We acknowledge the current crisis of public confidence in the military justice system, particularly as it relates to allegations of sexual misconduct. Although Military Police investigators and military prosecutors possess the professional skills, dedication and competence to investigate and prosecute criminal and disciplinary offences, we recognize that this has not been enough to build and maintain trust and confidence in the military justice system. We are keenly aware that the proper functioning of any justice system relies on public confidence.
>
> 5. The increasing lack of public confidence in the military justice system is a real and pressing concern. Consequently, exercising our authority as independent actors, we will implement Mme. Arbour's interim recommendation immediately. The CFPM has started to work on policy directives that will be issued to the members of the Military Police and to establish a framework to give precedence to the exercise of civilian jurisdiction over the investigation of sexual assault and other criminal offences of a sexual nature under the *Criminal Code*. We will initiate a conversation with our civilian counterparts to develop workable processes and effective practices with them. We are committed to updating our policies, practices and procedures in respect of the exercise of concurrent jurisdiction.
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> . . .
>
> 9. To victims, who are at the forefront of all that we do, rest assured that the Military Police will support you throughout any transfer process to the civilian justice system. You and anyone affected by

> this change will be contacted in the coming days by the Military Police to discuss the way forward and to answer any questions you may have.
>
> 10. We are committed to playing our part in restoring public confidence in the military justice system. The implementation of the Declaration of Victims' Rights, the other provisions of Bill C-77, and the recommendations from the various external reviews will all go a long way in these efforts. We also believe that greater emphasis on civilian investigations and prosecutions for sexual assault and other criminal offences of a sexual nature under the *Criminal Code* is now appropriate and necessary. Canadians can be assured that the military justice system stands ready to act where the civilian criminal justice system is unable or declines to exercise its jurisdiction in these matters."
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> [My emphasis.]

[32] On 16 December 2021, the Right Honourable Justin Trudeau, Prime Minister of Canada, issued a mandate letter directing the MND prioritize the following:

> "To realize these objectives, I ask that you achieve results for Canadians by delivering the following commitments.
>
> …
>
> - In consultation with survivors, take action to transform the culture of the CAF, rebuild trust and build a healthy, safe and inclusive workplace, free from harassment, discrimination and violence, including by:
>
> - Implementing interim and final recommendations of the Independent External Comprehensive Review conducted by Justice Louise Arbour on a priority basis, including to institute external oversight over the reporting, investigation and adjudication of complaints, outside the chain of command; and
>
> - Working to eliminate all sources of anti-Indigenous and anti-Black racism, LGBTQ2 prejudice, gender bias and white supremacy in the CAF, implementing recommendations from the Advisory Panel on Systemic Racism and Discrimination on a priority basis.
>
> - In consultation with survivors, and with the support of the Minister for Women and Gender Equality and Youth, work

to end discrimination, sexual misconduct and gender-based violence in the military by:

- Modernizing the military justice system, with a focus on implementing recommendations from the Third Independent Review of the *National Defence Act*, and bringing into force the Declaration of Victims' Rights to ensure survivors are treated with respect and have the full range of options and protections that are available in the civilian system;

- Implementing the recommendation from Justice Louise Arbour and Justice Morris J. Fish to move the investigation and prosecution of sexual assault cases from the military justice system to civilian courts;

- Expanding the services and resources available to survivors of sexual misconduct through the Sexual Misconduct Response Centre and, in collaboration with the Minister of Veterans Affairs, ensure all members of the Defence Team, including Department of National Defence employees, Veterans and members of military families, have access;

- Expanding health services available to women in the CAF, ensuring comprehensive access to sexual and reproductive health resources, child care and mental health resources;

- Increasing investments to understand and address the clinical, occupational and deployment health needs of CAF women; and

- Co-designing with survivors and fully funding a permanent peer-to-peer support program for those who have experienced military sexual trauma that is available to all members of the Defence Team and their families.

[My emphasis.]

Analysis

[33] In light of the ongoing scrutiny in the CAF flowing from the flood of allegations of sexual assault, it is undeniable that our military justice system must maintain its credibility and the confidence of the public. If our courts martial are

not viewed as credible, this undermines the acceptability of their findings and diminishes the reputation of the military justice system as a whole. A component of public credibility includes not only the actual but also the perceived impartiality of the military justice system to hold its members to account.

[34] The applicant argued that the letters from both the Prime Minister and the MND, is evidence of the public's lack of confidence in the military justice system ability to try offences of sexual assault. His argument is nested in the definition of a lack of public trust set out in *R. v. St-Cloud*, 2015 SCC 27, at paragraphs 74 to 78, where Wagner C.J. writing for the Court relies upon *R. v. Hall*, 2002 3 S.C.R 309 SCC 64, where the SCC explained "'that the 'public' in question consists of reasonable members of the community who are properly informed about the 'philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case.'"

[35] Although the documents before the Court are not evidence in their own right of the existence of a lack of public trust, they are public documents that rely upon or opine about perceived public concerns. In substance, I find that the documents are focused exclusively on how the complainants or victims of sexual assault in the military justice system are treated. This perception must be placed in the context of those factors that lie at the heart of a paragraph 11(d) analysis for impartiality which relates to an accused person's rights.

[36] When I review the evidence in its entirety, I find that there is merit in the prosecution's submissions that all of the evidence before the Court is seeded in Recommendation #68 of the Fish Report, which suggests the temporary transfer of sexual assault to civilian courts until the appropriate victims' protections are incorporated into the *NDA*.

[37] I must apply this reasonable person test while considering the context of the nature of the offence of sexual assault and any evidence before the Court that suggests that any court martial trying this offence is perceived as impartial.

[38] I must also consider the context under which Recommendation #68 of the Fish Report was made and the fact that this recommendation was only to transfer the files to civilian courts for a temporary period until the DVR legislative provisions have taken effect in the *NDA*. He also clearly introduced a caveat that recommended cases proceed to courts martial where the victim so consents. This is an important fact that must not be lost as it provides the underlying focus of the recommendation. It is also significant that the Fish Report did not recommend the removal of the jurisdiction of courts martial to try offences of sexual assault. It hoists in the practical barriers that exist due to jurisdictional complexities of a particular case or other factors while ensuring that victims are still able to seek relief within the military justice system.

[39] If anything, the messaging sent with Recommendation #68 appears directed to Parliament seeking that it prioritize the implementation of Bill C-77 in a timely fashion. When I consider the philosophy of the legislative provisions, in the *NDA*, the *CVBR* and

the DVR for the protection of victims' rights, I find that the proposed changes underpinning the recommendations were never designed to supplant or subrogate an accused's right to make full answer and defence under paragraph 11(d) of the *Charter*. Consequently, it is not a logical leap to suggest that just because there might be a perceived loss in confidence in the way a complainant is treated in the military justice system that it automatically detracts from the rights of an accused.

[40] In *Edwards*, the CMAC made it clear that trial judges must take into account the contextual considerations which safeguard the independence and impartiality of the court martial process. In this application, the contextual considerations surround the offence of sexual assault and the perception of the public.

[41] This means that the statements and recommendations set out in the evidence before the Court must be assessed in the context of the substance to which they relate. From a legal perspective, the evidence before the Court reflect political statements made in specific response to Recommendation #68 that flows from a study (Fish Report) that was in fact a report requisitioned by the Executive itself.

[42] Following through the consistent thread in the evidence, I find that that the MND's direction was a direct response to the interim recommendation made by Arbour J., to transfer all sexual assault cases to the civilian justice system consistent with Recommendation #68 set out in the Fish Report.

[43] After reviewing all the evidence, I find it focuses primarily on how complainants/victims are treated by the chain of command and the military police/CFNIS. Importantly, paragraph 11(d) *Charter* rights do not guarantee the treatment of complainants, but rather the *Charter* rights belong exclusively to accused persons. There is no evidence before the Court that suggests that an accused person's rights to be tried by an impartial tribunal have been violated simply because of the concern expressed for the rights of victims. The two sets of rights must co-exist. Further, there is no evidence to suggest a lack of trust in the military judiciary's ability to try the offence of sexual assault, nor concerns raised with respect to the court martial process itself.

[44] Based on the type of evidence before the Court, I find that the underlying public pressure that precipitated the interim recommendations based on concern for victims cannot by itself crystallize into a paragraph 11(d) violation of an accused person's rights. If it did, then the entire civilian criminal justice system would have been held unconstitutional up until 23 July 2015 prior to the *CVBR* coming into force. The societal pressure to safeguard the rights of complainants is not unique to the military justice system. The only critical difference has been that complainants' rights have been legislatively recognized in the civilian system since 2015.

[45] The evidence only suggests that the basis of the recommendation from Justice Fish, later accepted by Arbour J. in her interim report, is linked to what Justice Fish perceived as a less than ideal state of affairs given the government's slow progress in

implementing legislation to protect victims. I note that the implementation of the relevant legislation is now relatively imminent. Given the passage of Bill C-77, this situation was temporary in nature and it is safe to assume that so too is the recommendation. Obviously cases preferred have continued before military judges since Fish J. rendered his report. He also made it clear that he was not recommending that jurisdiction over sexual assault be removed from the military justice system.

Conclusion

[46] In conclusion, I find that on their own, the recommendations of Fish and Arbour JJ., the direction of the MND and the joint statement of the Provost Marshall and DMP, as well as the mandate letter of the Prime Minister cannot sustain a declaration of unconstitutionality of an accused person's rights to be tried by a fair and impartial tribunal.

[47] I find that an informed person, viewing the matter realistically and practically and having thought the matter through, in my respectful view, could reach no other conclusion that the jurisdiction for the court martial process in trying the offence of sexual assault meets the minimum constitutional norms of impartiality as required by paragraph 11(d) of the *Charter.*

FOR THESE REASONS, THE COURT:

[48] **DISMISSES** the application.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services counsel for the Applicant, Petty Officer, 1st Class J.R. Levesque (retired)

The Director of Military Prosecutions as represented by Major C.R. Gallant, Respondent