**COURT MARTIAL**

**Citation**: *R v Paul* and *Babin*, 2014 CM 2013

**Date:** 20140616
**Docket:** 201391

Standing Court Martial

Asticou Centre Courtroom
Asticou Centre, Gatineau, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Major S.J. Paul and Master Corporal C.D. Babin, Accused**

**Before:** Colonel M.R. Gibson, M.J.

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**REASONS FOR DECISION**

(Orally)

[1] Major Paul and Master-Corporal Babin are jointly charged with an offence under section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline.

[2] The particulars of the charge allege that: "In that they, between July and October 2012, at or near Multinational Force and Observers North Camp, Egypt, did engage in an adverse personal relationship, contrary to TFEG Standing Order 4.00."

[3] Counsel for Master Corporal Babin has made an application pursuant to QR&O 112.05(5)(e) asserting that Master Corporal Babin cannot be tried for this offence, and seeking a stay of proceedings, on the following three bases:

(a) the order that forms the basis of the charge is *ultra vires* as the Commander TFEG did not have the authority to create an offence of engaging in an "adverse personal relationship" or "adverse relationship" as stated in paragraph 7 of the order;

(b) the order is so vague that it offends a principle of fundamental justice guaranteed at section 7 of the *Charter*; and

(c) the order constitutes a violation of the rights guaranteed at sections 7, 2(b), 2(d) of the *Charter* and cannot be saved under section 1 as the order does not constitute a limit "prescribed by law", nor, in any event, is it reasonable and demonstrably justifiable in a free and democratic society."

[4] In his submissions, counsel for the applicant did not argue the section 2(b) and 2(d) issues, but confined his submissions to the section 7 issue.

[5] The TFEG Theatre Standing Order 4.00 on Personal Relationships and Fraternization Policy at issue is in evidence as Exhibit 3. Key extracts for the purpose of the analysis required to deal with this application are follows. Paragraph 2 (b) of the TFEG order provides that:

> "personal relationship means an emotional, romantic, sexual or family relationship, including marriage, common-law partnership or civil union, between individuals."

Subparagraph 2 (c) provides that:

> "an adverse personal relationship is one that results in a negative effect on the security, cohesion, discipline, operational effectiveness or morale of TFEG or the MFO. This type of relationship can detract from the authority of superiors, or result in or reasonably create an appearance of favouritism, misuse of office or position, or the abandonment of organizational goals for personal interests."

Subparagraph 2 (d) provides that:

> "fraternization means any relationship between any TFEG member and another member of TFEG, a member of the MFO, a local inhabitant, or a member of either of the receiving states within the AOO; which means area of operations."

Paragraph 3 of the order provides:

> "It is recognized that TFEG members form friendships in addition to professional relationships as they participate in work

> and recreational activities together. The Commander TFEG acknowledges the right of members to form personal relationships and will not intervene to prevent or restrict their development or expression except when required to ensure unit effectiveness through the maintenance of discipline, morale and cohesion. The AAO is first and foremost a workplace, and the conduct of the personnel who work there must reflect this reality. Whether a relationship develops or is pre-existing, every member has a duty to report a personal relationship to the Commanding Officer."

Paragraph 5 of the order provides in respect of commander's intent:

> "To ensure that no adverse personal relationships or fraternization be allowed to undermine the security, discipline, morale, cohesion, operational effectiveness or safety of TFEG and the MFO as a whole."

And importantly, paragraph 7 of the order provides that:

> "TFEG members shall not engage in adverse relationships or in any relationship that could be perceived as being adverse."

[6] The TFEG Standing Order is derived from, but does not exactly replicate, DAOD 5019-1 on Personal Relationships and Fraternization, which applies Canadian Forces-wide.

[7] Turning to the first ground raised in the application, the court does not agree with the applicant's assertion that the order that forms the basis of the charge is *ultra vires* as the commander did not have authority to create an offence of engaging in "adverse personal relationship" or "adverse relationship" as stated at paragraph 7 of the order.

[8] Pursuant to QR&O 4.02(1)(c ), the Commander TFEG as an officer in the Canadian Forces has a duty to "promote the welfare, efficiency, and good discipline of all subordinates." Pursuant to QR&O 4.21(1), as the commanding officer, he had the duty to issue standing orders which shall include orders that are peculiar to the commanding officer's base, unit or element.

[9] Moreover, the CDIO issued by the Commander CJOC had directed the Commander TFEG to develop and issue a standing order on personal relationships and fraternization, using DAOD 5019-1 as a guide. Thus, the court concludes that the Commander TFEG had ample authority, in fact even a duty, to develop and promulgate the TFEG Standing Order addressing the issues of personal relationships and fraternization. If, as the applicant asserts, the content of the TFEG differs from or even is inconsistent with the DAOD, this does not deprive the Com-

mander TFEG of the authority to issue the order. Authority to issue, and content, are different issues. The Commander TFEG's authority to issue the order was not solely a delegated one, and he was not obliged to exactly replicate either the content or scope of orders issued by higher-level authorities.

[10] The second prong of the applicant's argument, that the order is so vague that it offends a principle of fundamental justice and violates section 7 of the *Charter*, engages more complex considerations.

[11] Section 7 of *Charter* provides that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[12] The risk of incarceration upon conviction for this offence clearly engages the accused's liberty interest under the *Charter*. The section 129 offence is punishable by dismissal with disgrace from Her Majesty's Service or to less punishment. Pursuant to the scale of punishments at section 139 of the *National Defence Act*, for the applicant Master Corporal Babin this would include the possibly of the custodial punishments of imprisonment for less than two years, or detention.

[13] Somewhat similar issues were considered by the then-Chief Military Judge Colonel Brais in the Standing Court Martial of *Corporal Montgomery*, held in Edmonton in 2001. The accused in that case made a *Charter* application seeking a stay of proceedings on the basis that the Task Force Bosnia-Herzegovina Contingent Standing Order 104 prohibiting sexual relationships in theatre violated section 2(b) or section 7 of the *Charter*, on the basis of vagueness and overbreadth.

[14] The court in that case did not grant the application, but made several observations that are relevant to the present case. The first of these may be found at page 170 of the case where the court said:

> Incidently [*sic*], the court is satisfied that the accused is entitled to constitutionally challenge CSO 104 as part of his defence before the court martial. Should the court find that there is indeed a violation of the accused's *Charter* rights and that the order can neither be read down or saved by section 1 of the *Charter*, the court would be in a position to grant the remedy sought, that is, a stay of proceedings.

The second starts at page 174 of the case at line 38:

> A matter that needs to be resolved prior to starting any analysis, is whether CSO 104 can be construed as a law prescribing limits on the rights and freedoms guaranteed by the *Charter*. Many arguments militate in favour of recognizing that regulations, instructions and orders adopted under the *National Defence Act* are laws which control and, at times, limit the conduct of members of the Canadian Forces.

> The most important argument is found in the very wording of section 129 of the *National Defence Act* which reads in paragraphs 1 and 2 as follows:
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> 129.(1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
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> (2) An act or omission constituting an offence under section 72 or a contravention by any person of
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> (a) any of the provisions of this Act,
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> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
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> (c) any general, garrison, unit, stations [*sic*], standing, local or other orders,
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> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.
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> By this enactment, Parliament has seen fit to allow the military authorities to turn breaches of regulations, instructions and other orders, such as CSO 104, into service offences which can be tried by service tribunals and in respect of which convicted members of the Canadian Forces may suffer the usual penal consequences. A list of these penal consequences can be found at section 139(1) of the *National Defence Act* which provides for all the punishments that can be imposed by a military tribunal. Thus, the court is of the view that these regulations and orders, where they purport to prohibit certain types of action or conduct, have essentially the same effect on the lives of military people as have the provisions of other statutes of Parliament like the Criminal Code of Canada [*sic*], for example, on the whole of the people of Canada. In that sense, the court considers that CSO 104 contains limits to rights and freedoms that are imposed by law and that the section 1 principle of the *Charter* has application.

I would generally agree with these propositions advanced by the court in the *Montgomery* case.

[15] Counsel for the applicant submitted in argument that the *Montgomery* case is distinguishable on its facts from the present case in terms of its outcome because of the nature of the order at issue, and the charge that was laid. In the *Montgomery* case, the accused was charged with engaging in sexual activities contrary to the order, whereas in the present case, the two accused are charged with engaging in an adverse personal relationship, as defined in the TFEG order, a much broader (and potentially vague) concept. I agree with this characterization.

[16] The doctrine of vagueness was recently surveyed by the Supreme Court of Canada in the case of *R. v. Levkovic*, 2013 SCC 25. Justice Fish, writing for the court, said this starting at paragraph 1 of the case:

> Impermissibly vague laws mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted or punished for an act or omission that is not clearly prohibited by a valid law. That principle is now enshrined in *the Canadian Charter of Rights and Freedoms*. This has been recognized by the Court since its earliest pronouncements on unconstitutional vagueness in the *Charter* era.

At paragraph 2, Justice Fish continued:

> In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, the Court cited with approval two decisions of the Supreme Court of the United States holding that "impermissibly vague laws" violate "the first essential of due process of law" (p. 1151), and continued as follows:
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> > The principles expressed in these two citations are not new to our law. In fact they are based on the ancient Latin maxim *nullum crimen sine lege, nulla poena sine lege* — that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards . . . . This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law.

At paragraph 3, Justice Fish continued:

> And very recently, speaking for the Court in *R. v. Mabior*, 2012 SCC 47, [2012] S.C.R. 584, Chief Justice McLachlin reaffirmed the governing principle in these terms:
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> > It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done . . . . Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s. 7 of the *Canadian Charter of Rights and Freedoms* and has no place in the Canadian legal system.

At paragraph 32 of the *Levkovic* case, Justice Fish continued:

> The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion. Understood in light of its theoretical foundations, the doctrine against vagueness

> is a critical component of a society grounded in the rule of law: *R. v. Nova Scotia Pharmaceutical Society*.

At paragraph 33, Justice Fish continued:

> Since long before the *Charter*, Canadian criminal law has adhered to the principle of certainty: prohibited conduct must be fixed and knowable in advance.

And then he cites certain additional authorities. At paragraph 34, he concludes:

> This does not mean that an individual must know with certainty whether a particular course of conduct will ultimately result in a conviction of the crime that prohibits such conduct. What it does mean is that the essential elements of the crime must be ascertainable in advance. If an accused must wait "until a court decides what the contours and parameters of the offence are then the accused is being treated unfairly and contrary to the principles of fundamental justice".

At paragraph 37, Justice Fish continued:

> The rule against unconstitutional vagueness is primarily intended to assure the intelligibility of the criminal law to those who are subject to its sanctions and to those who are charged with its enforcement. As this Court stated in *Ontario v. Canadian Pacific Ltd*., [1995] 2 S.C.R. 1031, at para. 82:
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> > In the context of vagueness, proportionality plays no role in the analysis. There is no need to compare the purpose of the law with its effects (as in overbreadth) . . . . A court is required to perform its interpretive function, in order to determine whether an impugned provision provides the basis for legal debate.

Finally, at paragraphs 47 and 48 of the *Levkovic* case, Justice Fish asserted:

> A court can conclude that a law is unconstitutionally vague only after exhausting its interpretive function. The court "must first develop the full interpretive context surrounding an impugned provision" ...

And he cites the *Canadian Pacific* case for the precept. At paragraph 48, he concluded:

> To develop a provision's "full interpretive context", this Court has considered: (i) prior judicial interpretations; (ii) the legislative purpose; (iii) the subject matter and nature of the impugned provision; (iv) societal values; and (v) related legislative provisions ...

[17] The law on vagueness as developed by the Supreme Court of Canada may be summarized in the following fashion. In *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, and I paraphrase for succinctness, the court indicated

that: The doctrine of vagueness is a principle of fundamental justice under this section and is also part of the section 1 analysis in that a law may be so vague as to not meet the requirement of "prescribed by law." Vagueness as a principle of fundamental justice is based on the requirements of fair notice of the citizen and limitation on law enforcement discretion. The concept of fair notice includes a formal aspect; that is, acquaintance with the actual text of the statute and a substantive content; that is, an understanding that certain conduct is the subject of legal restrictions. The concept of a limitation on law enforcement discretion is based on the principle that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Legal rules reach the point of certainty only in particular cases when the law is determined by competent authorities. In the meanwhile, conduct is guided by approximation. Legal dispositions, therefore, delineate a risk zone and cannot hope to do more unless they are directed in individual instances. A provision is unconstitutionally vague, therefore, where it does not provide an adequate basis for legal debate; that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk and, thus, can provide neither fair notice to the citizen nor limitation of enforcement discretion. The courts must however be wary of using the doctrine of vagueness to prevent or impeach state action and furtherance of valid social objectives by requiring a law to achieve a degree of precision to which the subject matter does not lend itself.

[18] This interpretation was amplified in *R. v. Canadian Pacific Ltd.*, [1995] 2 SCR 1028, where the court held, and again I paraphrase: Vagueness must not be considered in the abstract but must be assessed within the larger interpretive context developed through an analysis of consideration such as the purpose, subject matter, and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after a court has exhausted its interpretive role will it then be in a position to determine whether the provision affords sufficient guidance for legal debate.

[19] With these necessary observations and self-instructions made, I now turn to the specific analysis required by this case. The purpose, subject matter and nature of the impugned provision are set out in the various paragraphs of the TFEG order which I recited earlier, as well as in the provisions of the DAOD 5019-1.

[20] The heart of the issue relates to the interpretation and effect of paragraph 7 of the order. This provides that: "TFEG members shall not engage in adverse relationships or in any relationship that could be perceived as being adverse." The portion of this that is particularly problematic is the second half: "that <u>could</u> be <u>perceived</u> as being adverse." The difficulty arises from the open-ended contingent nature of the prohibition (that is, "could"), and of how it is to be assessed ("perceived.") This is particularly so in relation to those elements of the definition of "adverse personal relationship" at subparagraph 2(c) of the order that are inherently subjective: morale and cohesion. Indeed, on the evidence heard in this case, it

was the purported negative effect on morale of the other contingent members arising from their perceptions of what sort of relationship Master Corporal Babin and Major Paul had, that was advanced as the chief harm that had been occasioned. The difficulty is that it might be said that potentially, virtually anything could be perceived as adverse in this sense. The question also arises: perceived by whom? On what standard? How does one ultimately assess the concept of morale with sufficient precision in this context? Is the jealousy or dislike of other contingent members a sufficient basis to establish criminal liabilty?

[21] Having regard to the test for vagueness articulated by the Supreme Court of Canada, I conclude that this provision provides insufficient guidance for legal debate.

[22] Ultimately, this articulation of "could be perceived" strikes the court as the sort of "standardless sweep" that the law on vagueness seeks to avoid. It does not adequately fulfill the function of identifying a zone of potential risk to persons contemplating a personal relationship. In military parlance, it does not adequately identify a left and right of arc for permissible conduct for contingent personnel to refer to.

[23] It fails in the requirements of providing fair notice to the citizen, and limitation on law enforcement discretion by service authorities.

[24] In answer to a question from the court on this point in argument, counsel for the respondent on the application submitted that the zone of risk ultimately boiled down to having personal relationships of any sort. Given that the definition of "personal relationship" at subparagraph 2(b) of the order includes an "emotional relationship," the court cannot accept that this is a constitutionally permissible interpretation of the law. It would be potentially Orwellian in its implications. Surely members of the Canadian Forces cannot be instructed that they are to be essentially robots while on deployment, and that they put themselves at risk in developing any friendships or emotional attachments during a deployment. Such an interpretation might well infringe section 2(d) of the *Charter*. Indeed, such an interpretation would be inconsistent with the indication at paragraph 3 of the TFEG order that "Commander TFEG acknowledges the right of members to form personal relationships and will not intervene to prevent or restrict their development or expression, except when required to ensure unit effectiveness through the maintenance of discipline, morale and cohesion." It would also be inconsistent with the recognition in DAOD 5019-1 of the "inherent right of Canadian Forces members to form personal relationships of their own choosing."

[25] For these reasons, the court concludes that the key paragraph of the TFEG Theatre Standing Order 4.00, paragraph 7, is impermissibly vague, and that to convict Master Corporal Babin or Major Paul on that basis would infringe their rights under section 7 of the *Charter*.

[26] I turn now to the question of whether the section 7 vagueness infringement could be saved under section 1. Section 1 of the *Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[27] It has frequently been observed that it will be a rare case in which a section 7 violation could be saved under section 1 of the *Charter*: for example, the famous and important BC Motor Vehicle Reference case, at page 518 of the case.

[28] The Supreme Court of Canada has recently had occasion to examine this issue further in *Attorney General of Canada v Bedford*, 2013 SCC 72. Chief Justice McLachlin, writing for the full Court, said this in respect of this issue starting at paragraph 124 of the case in dealing with the relationship between section 7 and section 1:

> This Court has previously identified parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights. These parallels should not be allowed to obscure the crucial differences between the two sections.

At paragraph 125, she continued:

> Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

At paragraph 126, she continued:

> As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh

> the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.
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> [127] By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.
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> [128] In brief, although the concepts under s. 7 and s. 1 are rooted in similar concerns, they are analytically distinct.

Finally, she concluded at paragraph 129:

> It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter* (*Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *Malmo-Levine*, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.

[29] The court considers that in the present case, it is not necessary to embark on a section 1 analysis given that it is very difficult to conceive of an instance in which an impermissibly vague provision could be saved under section 1, given the nature of the *Charter* infringement at issue.

[30] However, even if I am wrong on this point, the court considers that the infringement of the applicant's section 7 rights in this case could not be saved under section 1. This would fall to be assessed on the test first articulated in *R v Oakes* [1986] 1 SCR 103 at 138, and developed in subsequent jurisprudence. A useful articulation of the modified *Oakes* test may be found at *R v Hislop* [2007] 1 SCR 429 at 453, which frames four tests:

> (1) Is the objective of the legislation pressing and substantial?
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> (2) Is there a rational connection between the government's legislation and its objective?
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> (3) Does the government's legislation minimally impair the *Charter* right or freedom at stake?

(4) Is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation?

[31] In the present case, I consider that the impugned order would manifestly fail the minimal impairment branch of the test. The objective of the order could be achieved without the vague and draconian language of the second portion of paragraph 7.

[32] Incidentally, I do not consider that the analysis undertaken by the Supreme Court of Canada in the case of *Doré v Barreau du Québec* referred to by counsel for the respondent in his submission would be applicable in the present case, as this is not a case as in *Doré* of an administrative decision maker in an administrative law context, but rather the adjudication of a service offence under the Code of Service Discipline, which potentially has true penal consequences should the accused be convicted. The *Charter* analysis must be undertaken by the court in the same fashion as that for a *Criminal Code* charge being tried by a civilian court of criminal jurisdiction.

[33] I would not wish to be taken as suggesting that the objective or purpose of TFEG Standing Order 4.00 is improper. It addresses an important and very real issue on deployments of the Canadian Forces in operational theatres abroad; that is, the potential impact of inappropriate personal relationships on operational effectiveness through the maintenance of discipline, cohesion and morale. The difficulty in this case is that paragraph 7 of the TFEG order goes too far, and strayed into impermissible vagueness that cannot constitutionally be the basis for a conviction of an offence with potential true penal consequences.

[34] The court, as did the court in the *Montgomery* case considering the same issue in terms of remedy should the constitutional violation be made out, considers that the appropriate remedy under section 24(1) of the *Charter* would be a stay of proceedings.

[35] Although this argument was advanced by the applicant, Master Corporal Babin, given the court's conclusion, the remedy must apply to both accused persons before the court.

**FOR THESE REASONS, THE COURT:**

[36] **DIRECTS** that the proceedings against Master Corporal Babin be stayed on the first and only charge set out in the charge sheet.

[37] **DIRECTS** that the proceedings against Major Paul be stayed on the first and only charge set out in the charge sheet.

**Counsel:**

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