Federal Court  Cour fédérale

Date: 20200303

Docket: T-1151-19

Citation: 2020 FC 330

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 3, 2020

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE DIRECTOR OF MILITARY PROSECUTIONS

Applicant

and

DEPUTY CHIEF MILITARY JUDGE (in his capacity as deputy judge of duties and functions set out in section 165.25 of the *National Defence Act*, RSC 1985, c N-5)

and

COLONEL MARIO DUTIL

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an unprecedented situation that has been plaguing the military justice system for some time in the Canadian Forces [Forces]. The case has caused quite a stir as the accused is in no way *quidam*: Colonel Mario Dutil, Chief Military Judge, was cited for a Standing Court Martial [the Court Martial]. He must defend himself against fraud and false statement charges in an official document, as well as behaviour prejudicial to good order or discipline because he allegedly had a personal relationship with a non-commissioned officer, in this case, a court reporter who was apparently under his command [the charges].

[2] The charges were common knowledge and made headlines. The same day they were laid, on January 25, 2018, Commodore Geneviève Bernatchez [Judge Advocate General] issued a public release reaffirming the equality of each and every one before the law. However, Colonel Dutil's trial was adjourned on June 17, 2019, following Lieutenant-Colonel Louis-Vincent d'Auteuil's recusal [Deputy Chief Military Judge] (*R v Dutil*, 2019 CM 3003 [the recusal decision]). But no military judge was appointed by the Deputy Chief Military Judge for the reasons set out in the June 17, 2019, letter he filed in the Court Martial file [the non-assignment decision], giving rise to this application for judicial review.

[3] The legality and reasonableness of the recusal decision are not at issue today. In this case, this applicant, the Director of Military Prosecutions, is seeking a writ of *mandamus* to force the Deputy Chief Military Judge, in his capacity as designate judge, with the jurisdiction to allocate set out in section 165.25 of the *National Defence Act*, RSC 1985, c N-5 [NDA], to assign a military judge from among the other eligible military judges to preside at the Court Martial.

Alternatively, the applicant is also seeking a writ of *certiorari* for the purposes of setting aside the non-assignment decision [the impugned decision].

[4] In this file, the Attorney General of Canada is protecting the applicant's interests, if not those of the Judge Advocate General and Defence Staff, who were also involved in the decision to lay charges against the Chief Military Judge. Be that as it may, it is highly irregular, and most unusual, that the federal board was unilaterally named as the respondent in the Notice of Application for judicial review, and forced to defend itself, without the applicant having obtained prior leave of this Court (subsections 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106; *Northwestern Utilities Ltd and al v Edmonton*, [1979] 1 SCR 684 at pages 709-710).

[5] At the start of the hearing on October 15, 2019, and after hearing the oral submissions from Counsel, the Court thus added Colonel Dutil as a respondent, which resulted in an adjournment of a few weeks. The case was heard on the merits on November 27, 28 and 29, 2019. On February 3, 2020, during the Court deliberations, the parties brought to its attention the decision handed down on January 10, 2020, in *R v Pett*, 2020 CM 4002 [*Pett*], and were able to submit additional representations regarding the relevance and impact of this decision, which is currently subject to an appeal by the accused (Docket CMAC-603).

[6] This application for judicial review is dismissed for the reasons that follow.

II. **Issue**

[7] Colonel Dutil is entitled to be tried within a reasonable time in a fair and public hearing by an independent and impartial tribunal (paragraphs 11(b) and (d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, constituting Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]).

[8] However, herein lies the problem: is there a military judge who can be assigned today by the Deputy Chief Military Judge to preside at the Court Martial without a reasonable apprehension of bias yet again arising?

[9] Furthermore, the Court Martial is governed by the provisions of the *Official Languages Act*, RSC 1985, c 31 [OLA]. Given that Colonel Dutil opted for his proceedings to be in French, the decision-maker should incidentally understand French without the assistance of an interpreter (paragraph 16(1)(b) of the OLA; *R v Thibeault*, 2014 CM 3022).

[10] Yet, there are indeed three potential candidates from among the current contingent of military judges who are Regular Force officers (section 165.21 of the NDA): commanders Martin Pelletier (appointed military judge on April 10, 2014), Sandra Sukstorf (appointed on February 17, 2017) and Julie Deschênes (appointed on May 23, 2019) [the other eligible military judges]. Yet none were assigned by the Deputy Chief Military Judge, for the reasons set out in the impugned decision of June 17, 2019, which must be read in conjunction with the recusal decision.

III. **General legal framework: the distinctiveness of military law**

[11] First, so as to allow a better understanding of the issues and respective positions of the parties, it seems necessary to insist on the contextual aspects—legal and factual—that are specific and unique to this case, at the risk of prolonging the current reasons. However, it must be clear that, in addressing the specific problem of the complex questions arising around the impugned decision, this Court is in no way suggesting that it interfere in the role played by the Court Martial as a trier of facts and merits, nor interfere in the applicant exercising discretion regarding charges and military prosecutions.

A. *Code of Service Discipline*

[12] As the Supreme Court recently noted, the military justice system has gone from a disciplinary model centred around a command that provides poor procedural safeguards for a parallel justice system greatly similar to the penal justice system (*R v Stillman*, 2019 SCC 40 at paragraph 53 [*Stillman*]; for a detailed history, see R.A. McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985), 1 *Rev JAG* 1 at pages 1-28).

[13] In effect, the purpose of the *Code of Service Discipline* (Part III of the NDA) is to maintain discipline, efficiency and morale of the military (*R v Moriarity*, 2015 SCC 55, [2015] 3 SCR 485 at paragraph 46 [*Moriarity*]). Section 130 of the NDA "creates an offence under the *Code of Service Discipline*" of violations of federal laws, including the *Criminal Code*, RSC 1985, c C-46 (*Moriarity* at paragraph 7).

[14] Nonetheless, the *Code of Service Discipline* establishes a hybrid system. All officers and service members subject to the *Code of Service Discipline* are subject, in the case of committing service offences or offences punishable by ordinary law integrated in the *Code of Service Discipline* (section 130 of the NDA), to various sentences ranging in decreasing severity from imprisonment for life, imprisonment for two years or more, dismissal with disgrace from Her Majesty's service, imprisonment for less than two years, dismissal from Her Majesty's service, detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments—the appropriate authority has the power to impose on the offender less punishment than the maximum punishment set out in the *Code of Service Discipline* (sections 139 to 146 of the NDA).

[15] The NDA is silent about the application or non-application of the *Code of Service Discipline* to a military judge—including the Chief Military Judge and the Deputy Chief Military Judge. Nevertheless, at the time of their appointment, the persons appointed for this purpose must be officers (in addition to being members of a provincial bar), and serving legal officers while performing their judicial duties. It was thus recently decided that military judges are subject to the *Code of Service Discipline* similar to any officer or non-commissioned member described in subsection 60(1) of the NDA (*Pett* at paragraphs 14-15). Moreover, under section 165.231 of the NDA, a military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction. However, a military judge is not immune from liability under the *Code of Service Discipline* in relation to what he or she says and does outside the performance of their judicial duties (*Pett* at paragraphs 71-72).

[16] At first glance, there is nothing stopping Colonel Dutil from being charged, dealt with and tried before the Court Martial in respect of any service offence he may have allegedly committed while performing his duties as a military judge or Chief Military Judge, even after ceasing to be a Regular Force officer after the offence was committed (subsection 60(2) of the NDA; *Pett* at paragraph 21).

[17] Since the prosecution abandoned certain charges at the beginning of the trial, Colonel Dutil must now face charges of fraud and false statement in an official document as well as conduct to the prejudice of good order and discipline. The fraud charges are, in particular, connected to the *Criminal Code* and section 130 of the NDA, and therefore, not exclusive to the military justice system. Conversely, the charge of Conduct to the Prejudice of Good Order and Discipline (section 129 of the NDA) is unique to the *Code of Service Discipline* and relates to an offence of a specific order, directive DAOD 5019-1, because Colonel Dutil allegedly had a personal relationship with a non-commissioned officer, in this case a court reporter who was apparently under his command.

[18] In this case, if Colonel Dutil was found guilty by the Court Martial, as a maximum sentence, he risks imprisonment, not counting his dismissal with disgrace from her Majesty's service. Therefore, in a context in which the Court Martial deals with an issue that is disciplinary in nature on having serious consequences with respect to the freedom and career of the accused in the Forces, and that the presumption of innocence plays a central role in the issue to be decided, namely, whether or not Colonel Dutil is guilty, the issue of impartiality of the military judge assigned to preside at Colonel Dutil's Court Martial must naturally be treated with the

same rigour as a judge of a superior court of criminal jurisdiction (recusal decision at paragraph 58; *R v Leblanc*, 2011 CMAC 2).

B. *Directive DAOD 5019-1*

[19] In the civilian world, there is nothing that prevents two work colleagues—consenting adults—from entering into a romantic relationship and pursuing it outside the workplace. They do not require anyone's permission. Such a relationship is not at all criminal in and of itself. However, in the army, there are certain nuances because a personal relationship—defined as an emotional, romantic, sexual or family relationship—must not have an adverse effect on "the security, cohesion, discipline or morale of the unit" [emphasis added].

[20] A symbolic value of the entire army, unit cohesion ("esprit de corps") embodies this unique fraternity—transcending hierarchical levels—which ensures that members accomplish their mission, especially in combat or high-stress situations. The issue of consent has nothing to do with it: even consensual, a romantic relationship can have an adverse effect on unit cohesion. (See Chapter 5019-1 of the Defence Administrative Orders and Directives (DAOD) – Personal Relationships and Fraternization [directive DAOD 5019-1]; see also Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, March 27th 2015 at pages 41-42).

[21] It follows that CAF members must notify their chain of command of any personal relationship that could compromise the objectives of directive DAOD 5019-1. On an administrative level, CAF members who are known to be, or have declared themselves to be

involved, in a personal relationship must normally not be posted to the same unit. A CAF member in a personal relationship with another CAF member, shall not be involved, regardless of rank or authority, in the other person's performance assessment, postings, duties or scheduling for duties. Administrative action must also be taken to separate CAF members who are involved in such a relationship (directive DAOD 5019-1).

[22] Note that the main purpose of subsection 129(2) of the NDA is to give effect to regulations made by civilian authorities concerning "the organization, training, discipline, efficiency, administration and good government of the Canadian Forces" (section 12 of the NDA), and to enforce all orders and instructions issued by the Chief of Defence Staff that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister of National Defence [Minister], as mentioned in subsection 18(2) of the NDA (*R v Master-Corporal GC Steeves and ex-Private KM Temple*, 2007 CM 3021 at paragraph 12). Consequently, any member who does not comply with directive DAOD 5019-1 may be charged with an offence and contraventions prejudicial to good order and discipline (subsection 129(2)(b) of the NDA).

[23] In this case, the Office of the Chief Military Judge is indeed a "unit" of the Forces as determined by the Chief of the Defence Staff (section 17 of the NDA; sections 2.07 and 4.091 of *The Queen's Regulations and Orders* for the Canadian Forces (QR&O) [QR&O]. Directive DAOD 5019-1 therefore applies to this unit. However, under chapter 4 of the QR&O, an officer shall report to the proper authority any infringement of the pertinent statutes, regulations, rules and instructions governing the conduct of any person subject to the *Code of Service Discipline*

when the officer cannot deal adequately with the matter (section 4.02). We will see later on that this is what happened in this case in summer 2015, following intervention by the former legal adviser of the Office of the Chief Military Judge.

C. *Court martial prosecution and convening*

[24] Following investigation by military police, charges can be brought against a person subject to the *Code of Service Discipline* under the NDA in a Record of Disciplinary Proceedings [RDP]. The RDP is the military law equivalent of an information in the criminal law context (see *R v Edmunds*, 2018 CMAC 2 at paragraph 2). Moreover, note that a legal opinion from a legal officer (and therefore falling under the Judge Advocate General) is required prior to laying a charge against a military judge (subsection 164(1.3) of the NDA; section 107.03 of the QR&O; *Pett* at paragraph 31).

[25] Non-compliance with an order or directive falls under the discretion of the commanding officer and immediate supervisors, as this is, first and foremost, a disciplinary matter. However, after the charges are laid in the RDP, they are referred to an officer who is a commanding officer in respect of the accused person (section 161.1 of the NDA). The commanding officer then decides whether it is worth pursuing the charges, which can be dealt with summarily by a senior commander or, if applicable, referred to the Director of Military Prosecutions. In many cases, the CAF member accused of Conduct to the Prejudice of Good Order and Discipline will be swiftly tried and punished by their commanding officer, i.e., a senior commander. However, the situation is not as simple in cases involving personnel from the Office of the Chief Military Judge, for the following reasons.

[26] The Chief Military Judge holds a rank that is not less than colonel (subsection 165.24(2) of the NDA). However, although the Chief Military Judge has the powers and jurisdiction of an officer commanding a command with respect to the Office of the Chief Military Judge, the Chief Military Judge shall not exercise the powers or jurisdiction of a commanding officer or an officer commanding a command in respect of any disciplinary matter or a grievance (section 4.091 of the QR&O). The Chief Military Judge can therefore not discipline an officer or non-commissioned member (which includes a non-commissioned officer) in their unit who has committed an offence under the *Code of Service Discipline*. The disciplinary powers in question are instead vested to the officer who is appointed from time to time to the position of commanding officer at the Forces Base (Ottawa, Gatineau), with respect to any disciplinary matter regarding an officer, except for a military judge, or a non-commissioned member employed by the Office of the Chief Military Judge (paragraph 1c) of the order dated October 2, 2019 from General J.H. Vance, Chief of the Defence Staff [order dated October 2, 2019]). In the event that a non-commissioned member of the Office of the Chief Military Judge has a prejudicial personal relationship, immediate action must be taken by the commanding officer against the two individuals in question. However, what happens when a military judge is involved?

[27] First, subsection 164(1.3) of the NDA expressly states that a superior commander may not try a military judge by summary trial, such that it is up to the Chief of the Defence Staff himself or herself, or even the officer commanding a command set out in subsection 18(1) of the NDA [the referral authority] to defer the charges to the Director of Military Prosecutions (section 164.2 of the NDA). The referral authority makes recommendations that he or she

considers appropriate (subsection 164.2(1) of the NDA). Under the order dated October 2, 2019, the Deputy Vice Chief of the Defence Staff and the Vice Chief of the Defence Staff can respectively exercise the powers and qualifications of a commanding officer and a senior commander in respect of any disciplinary case against a military judge employed by the Office of the Chief Military Judge.

[28] Second, when charges are referred by the referral authority to the Director of Military Prosecutions, they are responsible for determining whether or not the charges must be brought before a court martial (*Pett* at paragraph 25). In this case, the latter cannot try a person without a formal charge. A charge is preferred when the charge sheet in respect of the charge is signed by the Director of Military Prosecutions, or an officer authorized by the Director of Military Prosecutions to do so, and filed with the Court Martial Administrator (section 165 of the NDA).

[29] Third, two types of courts martial exist: the General Court Martial and the Standing Court Martial. Both may try any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence (sections 166 and 173 of the NDA). However, courts martial are unique in that they are formed and dissolved for each case. Therefore, there is no court martial provided that the Court Martial Administrator has not convened a General Court Martial or a Standing Court Martial (sections 165.19 and 165.192 of the NDA; *Pett* at paragraphs 33-35). That said, the administrator performs their duties under the direction of the Chief Military Judge or the military judge to whom they delegated their powers (subsection 165.191(3) and section 165.27 of the NDA).

[30] Fourth, the Court Martial Administrator appoints the members of a General Court Martial (subsection 165.191(1) of the NDA). That said, the Chief Military Judge or their delegate (other than a military judge from the reserve force) assigns a military judge to preside at courts martial (general or standing) and entrusts them to perform the other judicial duties under the Act (sections 165.25 and 165.26 of the NDA). In addition, it goes without saying that the Chief Military Judge or their delegate must step back from any external interference regarding questions directly concerning the judicial duties of courts martial, including assigning military judges.

[31] Fifth, legal officers from the Office of the Judge Advocate General and Office of the Director of Military Prosecutions are called upon daily to process files that can result in a court martial and to represent the prosecution, where applicable. However, under the terms of DMP Policy Directive Nos 016/17, when there is a risk of a conflict of interest, either apparent or real, in terms of prosecution that could undermine public trust in the administration of military justice, a special prosecutor must be appointed. Nevertheless, appointing a special prosecutor does nothing to change the legislated situation, such that only the Director of Military Prosecutions is granted the authority to decide who is brought before a court martial and on what charges (*Pett* at paragraph 27).

[32] Lastly, it is necessary to make an aside on the role of Judge Advocate General that Judge Pelletier described in *Pett* as “all encompassing” (*Pett* at paragraph 29). Under subsection 9.1(2) of the NDA, the Judge Advocate General—who holds a rank that is not less than brigadier-general (section 9.4 of the NDA)—has the superintendence of the administration

of military justice in the Canadian Forces. For all practical purposes, the Judge Advocate General acts as legal adviser to the Governor General, the Minister, the Department and the Canadian Forces in matters relating to military law, even though it is understood that this is not in derogation of the authority of the Minister of Justice and Attorney General of Canada (sections 9.1 and 10.1 of the NDA). That said, the Director of Military Prosecutions acts under the general supervision of the Judge Advocate General (subsection 165.17(1) of the NDA).

D. *Independence of the Office of the Chief Military Judge*

[33] It is also important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces (*R v Généreux*, [1992] 1 SCR 259 at paragraphs 83, 98 [*Généreux*]). The issue of independence of courts martial and military judges is a complex issue which has generated much debate since 1992, and which still exists in 2020: public trust, and especially that of military personnel, toward the military justice system rests on, among other things, the independence of the Office of the Chief Military Judge.

[34] Prior to *Généreux*, the Judge Advocate General had full authority to assign the judge advocate who would preside at a court martial from among their personnel, all the while knowing that the individual would return to their duties under their direction once the trial was completed. In spite of the concerns regarding judicial independence raised in Généreux, it was not until 2011 that military judges "held office during good behaviour" until the age of retirement (from 1998 to 2011, military judges held office "during good behaviour" for a five-year term, renewable on the recommendation of an Inquiry Committee established under

regulations made by the Governor in Council) (section 2 of the Security of Tenure of Military Judges Act, SC 2011, c 22). In practice, unless they are "removed" in accordance with the procedure set out in the Act, military judges hold office until the age of 60 years, unless they resign in the interim (subsections 165.21(3), (4) and (5) of the NDA).

[35] Since the 2013 reform (*Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24), there are now two types of military judge: 1) a military judge who is an officer in the Regular Force (subsection 165.21(1) of the NDA); and 2) a military judge who is an officer in the Reserve Force (subsection 165.22(1) of the NDA). However, in the latter case, there are currently no names on the Reserve Force Military Judges Panel.

[36] As with civilian judges, the conduct of military judges may be subject to a complaint before an independent executive judicial body and the Chief of the Defence Staff. In particular, "having been guilty of misconduct" "manquement à l'honneur et à la dignité", "having being placed […] in a position incompatible with the due execution of his or her judicial duties" "un manquement aux devoirs de la charge du juge militaire, ou encore une situation d'incompatibilité", may constitute separate grounds rendering the military judge—including the Chief Military Judge—incapacitated or disabled from the due execution of his or her duties (subparagraphs 165.32(7)(a)(ii), (iii) and (iv) of the NDA).

[37] Although the passing of an act is not necessary to remove a military judge, as is the case for a federal or provincial civilian judge, the Military Judges Inquiry Committee may recommend to the Governor in Council that the military judge be removed (subsection 165.32(7)

of the NDA), or to remove the name of a reserve force military judge from the panel (subsection 165.221(1) of the NDA). In such cases, the inquiry committee is comprised of three judges of the Court Martial Appeal Court (CMAC), including one chair, appointed by his or her Chief Justice (subsection 165.31(1)). The Inquiry Committee investigates in the following cases: 1) if the Minister of Defence [Minister] so asks (subsection 165.32(1) of the NDA); or 2) if he decides to commence an inquiry following a complaint or charge from a person other than the Minister (subsection 165.32(2) of the NDA). In the second case, the chair of the inquiry committee may designate one of the members to examine the complaint or charge, and to recommend whether the Committee commences the inquiry.

[38] As can be seen above, the existence of an independent inquiry system of the conduct of military judges is such that it strengthens the institutional independence of the Office of the Chief Military Judge. That was also the main reason invoked in January 2020 by the court martial in *Pett*, for refusing to order a stay of the proceedings of a non-commissioned member who contested the impartiality and independence of the military judges on the grounds that they, themselves, could be cited for a court martial (*Pett* at paragraphs 89-102 and 145-149).

[39] In this case, the accused filed a notice of appeal against that decision on February 12, 2020. Yet why must we therefore refer to *Pett*?

[40] The reason is that, in the decision handed down by Judge Pelletier in *Pett*, based on the powers vested in the Court Martial under section 179 of the NDA, it was also determined that the order dated October 2, 2019, by General J.H. Vance, Chief of the Defence Staff, that allows the

Deputy Vice Chief of the Defence Staff and the Vice Chief of the Defence Staff to respectively exercise the powers and qualifications of a commanding officer and a senior commander, is inoperative in respect of any disciplinary case against a military judge employed by the Office of the Chief Military Judge. It should be noted, in passing, that the October 2, 2019, order is an update to the order issued on January 19, 2018, a few days before the charges laid against Colonel Dutil were referred to the Director of Military Prosecutions. In that case, Judge Pelletier found that the orders in question violate the judicial independence of military judges and raise reasonable apprehension of bias of the fact that, while they were on exercise, they could be brought before a court martial following charges authorized by a member of the military hierarchy, even if the NDA outlines an independent mechanism for complaints and removal of military judges through an inquiry committee comprised of three CMAC judges (*Pett* at paragraphs 43, 47, 48, 59, 60-62, 100, 102, 110, 116, 128, 131-133, 144 and 145-149).

[41] A few weeks after the decision of Judge Pelletier, Judge Sukstorf had to decide the same question in the case *R v D'Amico*, 2020 CM 2002 [*D'Amico*]. While raising certain issues regarding the applicability of the *Criminal Code* to military judges when they are outside Canada, Judge Sukstorf essentially concludes, like Judge Pelletier, that the order of October 2, 2019 infringes protected rights of an accused under paragraph 11(d) of the Charter and encroaches on the jurisdiction of the Inquiry Committee (*D'Amico* at paras 40, 41, 53, 56-64, 78-80). In doing so, Judge Sukstorf, by virtue of the powers conferred on a Court Martial in section 179 of the NDA, declares of no force or effect the order of October 2, 2019, while refusing to order a stay of the proceedings because there is an independent investigative mechanism for military judges.

[42] An independent monitoring regime indeed exists for the conduct of military judges. It remains to be determined whether a broad scope should be given to the violations mentioned in subsection 165.32(7) of the NDA, and whether, where applicable, they should include behaviour in violation of the *Code of Service Discipline*, which Judge Pelletier seems to suggest. At first glance, and without expressing a final opinion on the topic, to the extent that the inquiry committee can actually investigate the non-compliance by a military judge of a standard governing their conduct as a Forces officer, this avenue needs to be explored and seems to comply with the judicial independence of the Office of the Chief Military Judge. The fact remains that a minor offence that would justify a commanding officer disciplining a non-commissioned member or officer is certainly not serious enough in and of itself to justify a recommendation to remove a military judge. As we can see, *Pett* and *D'Amico* considerably complicates the flow of proceedings in this file and appears, at first glance, to be an obstacle to continuing Colonel Dutil's trial before the Court Martial, as long as the issue of the legality of the orders dated January 19, 2018, and October 2, 2019, are not resolved in final form by the Court Martial Appeal Court or another court of jurisdiction.

IV. **Factual background: chronology and proceedings**

[43] What is also exceptional in this case is the amount of extrinsic evidence—known as contextual evidence (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 20)—entered in the record before this Court by the parties. The recusal decision, including the *voir dire* before the Court Martial, all the proceedings preliminary to the preferring of charges against respondent Dutil—including the Record of Disciplinary Proceedings and the letter of application for referral to a

court martial—, the recordings, and all the records of the coordination conferences and pre-trial conferences (where the reasons for recusal and the charges in issue are discussed in great detail by counsel and the presiding judge) are part of the record of the Federal Court.

A. *History*

[44] Since he was called to the Quebec Bar in 1983, respondent Dutil already has a long and impressive track record in the Forces. In 1984, he started out as a legal officer in the Office of the Judge Advocate General. He was then successively employed as a deputy judge advocate, at the director level within the Office of the Judge Advocate General and the Office of the Department of National Defence/Canadian Forces Legal Advisor, and a senior counsel, before being appointed a military judge on January 10, 2001, and Chief Military Judge on June 2, 2006.

[45] The offences alleged against Colonel Dutil took place in 2014 and 2015. But another three years passed before the Chief Military Judge was charged, in January 2018, with violating the *Code of Service Discipline*. Even though Colonel Dutil chose, in the meantime, to remain in office and not to resign, these charges had the practical effect of preventing him, until now, from acting as Chief Military Judge, from presiding at a court martial, and from performing other judicial duties (all these duties were, in the interim, delegated to the Deputy Chief Military Judge). The fact remains that, by operation of law, Colonel Dutil will automatically cease to hold office as a military judge on March 20, 2020, the date of his sixtieth birthday (subsection 165.21(4) of the NDA). No extension of military service beyond that age was requested or granted by the Chief of Defence Staff. Colonel Dutil will be released from the Forces according to the normal procedure on the date of his birthday in accordance with

subsection 5(a), service completed - retirement age, from the table in section 15.01 of the QR&O.

[46] However, this retirement will not nullify the present charges in the Court Martial. There is nothing to limit the sentence that may be imposed under subsection 139(1) of the NDA in respect of a retired member of the Forces who was subject to the *Code of Service Discipline* at the time of the commission of the offense. If the dismissal with disgrace sentence from Her Majesty's service were to be imposed, the reason for release from paragraph 5(a), service completed - retirement age, from the table in section 15.01 of the QR&O would be amended for paragraph 1(a), misconduct - sentenced to dismissal, from the table of the same article. Not only is a dismissal with disgrace an indelible stain in the file of the accused convicted of an offense leading to imprisonment (section 140.1 of the NDA), but it goes without saying that it will irreparably jeopardize his future chances of employment in the army or elsewhere, not to mention the fact that he will no longer be able to use the rank title with the mention "retired". Similarly, reduction in rank could affect the accused's retirement pension (section 140.2 of the NDA). As we can see, even if Colonel Dutil will leave the Forces on March 20 to retire, the present case is not moot.

[47] According to the summary of facts in the recusal decision, Warrant Officer Annie Dorval (A.D. on the preferred charge sheet) joined the Office of the Chief Military Judge in the fall of 2013. She became a certified court reporter in March 2014. As explained by Colonel Dutil at the *voir dire*, in December 2014, he informed the Court Martial Administrator, Simone Morrissey, of his relationship with Warrant Officer Dorval (*voir dire* transcript at page 74). In addition, he

informed Judge d'Auteuil of the relationship in January 2015. That month, Warrant Officer Dorval went on sick leave and she was absent from the Office of the Chief Military Judge on an ongoing basis until her transfer to the Joint Personnel Support Unit, which at the time was meant to help members of the military make the career transition to civilian life and the civilian workforce. She was released from the Forces in February 2016 (paragraph 9 of the recusal decision).

[48] For his part, before becoming a military judge, Judge Deschênes was a legal adviser at the Office of the Chief Military Judge from July 2012 to July 2015, so at the time of the Chief Military Judge's alleged personal relationship with Warrant Officer Dorval. During that period, Judge Deschênes was called upon, on a daily basis, to advise the Court Martial Administrator, Ms. Morrissey, on all legal matters. She also personally witnessed the events related to the charges (paragraph 37 of the recusal decision; pages 118-120 of the *voir dire* transcripts).

[49] What is more, in November 2019, at the hearing of this application for judicial review, counsel for respondent Dutil informed this Court that Judge Deschênes communicated directly with the military police regarding the case before the Court martial. This communication took place on June 21, 2019, a month after she became a military judge. The disclosure document in question (document 60# 2105 23542) was entered by consent but with the following caveat from counsel for the applicant: it cannot be used to determine the reasonableness of the impugned decision. Nonetheless, in our view, this evidence is relevant to understanding the course of events, and it should be considered also with respect to the remedies and the exercise of the Court's discretion.

[50] As reported in the narrative and the emails that the prosecution communicated to the defence on June 26, 2019, Judge Deschênes communicated directly with the military police to provide details about the specific facts reported by the Deputy Chief Military Judge at paragraph 37 of the recusal decision. Even though her involvement was apparently very limited, Judge Deschênes felt the need to disclose to the military police an email dated May 20, 2015, that she had addressed to herself when she was at the Office of the Chief Military Judge. In this email, she states that on May 9, 2015, she saw the Chief Military Judge with Warrant Officer Dorval in a pub in Chelsea, thus confirming the rumours already circulating at the Office of the Chief Military Judge about their personal relationship. The Chief Military Judge stared at her and reportedly gave her a [TRANSLATION] "dark" look that "shocked" her a lot.

[51] In fact, on May 12 or 13, 2015, Judge Deschênes reported the incident in question to the Court Martial Administrator. The latter supposedly reassured her by informing her that administrative action had already been taken to transfer Warrant Officer Dorval to Bagotville, which would create separation. In addition, Judge Deschênes mentions having also approached Judge Pelletier, on May 15, 2015, to discuss the situation. He apparently told her that there was insufficient evidence to establish wrongdoing.

[52] Lastly, Judge Deschênes mentions having herself also sought independent legal advice from a legal adviser she trusted. The latter apparently confirmed that there was insufficient evidence to conclude that an "offence" had been committed. Under the circumstances, Judge Deschênes felt that she had absolved herself of any obligation she may have as an officer

under Chapter 4 of the QR&O (Volume I – Duties and Responsibilities of Officers). In July 2015, Judge Deschênes was posted to the Directorate of Law/Military Personnel.

B. *Ethics complaint against the Chief Military Judge*

[53] It is an important aspect in the current file: at the outset, the Office of the Judge Advocate General favoured formulating an ethics complaint formally before the Inquiry Committee, rather than initiating charges in court martial proceedings. During the *voir dire*, the Court Martial Administrator testified before the Court Martial that she had been approached by Colonel Bruce J. Wakeham, Chief of Staff of the Judge Advocate General, in September 2015. He wished to obtain her collaboration, because he planned to make a complaint to the Inquiry Committee. She refused, it seems, because it was not her role in the circumstances (paragraph 10 of the recusal decision).

[54] On October 9, 2015, Colonel Wakeham filed a complaint with the Inquiry Committee [the ethics complaint]. As Colonel Dutil confirmed during the *voir dire* of June 2019, the charges made against him today have the same factual basis as the ethics complaint with respect to the personal relationship he allegedly had in 2014 and 2015 with Warrant Officer Dorval (page 68 of the *voir dire* transcripts).

[55] The ethics complaint was not filed at the Court Martial, but the Deputy Chief Military Judge mentioned it in the recusal decision (paragraphs 10-13, 18 and 37 of the recusal decision). Indeed, during the *voir dire* of June 2019, Colonel Dutil identified Warrant Officer Dorval, retired Petty Officer 1st Class Smith and another person whom he identified, following the

proceedings of the Special Prosecutor, as Judge Deschênes, as being the persons involved in the ethics complaint (*voir dire* transcript at pages 87-88; recusal decision at paragraph 37).

[56] The factual context surrounding the ethics complaint proves to be not only relevant to understand why the Deputy Chief Military Judge recused himself on June 17, 2019 (paragraphs 38, 55, 75, 84 and 94), but also, why he did not assign the other eligible military judges, particularly Judges Deschênes and Pelletier (paragraphs 11-15 of the non-assignment decision).

[57] It was on November 5, 2015, that Colonel Dutil learned of the existence of the ethics complaint during a pre-trial conference with the counsel involved in a court martial. The same day, he informed the military judges on duty of the existence of this complaint (Colonel Dutil's testimony during the *voir dire* at page 74; Simone Morrissey's testimony during the *voir dire* at page 54; paragraphs 11 and 12 of the recusal decision).

[58] According to Colonel Dutil's testimony, after the ethics complaint, his relations with Judge Pelletier gradually degenerated (*voir dire* transcript at pages 105-108), to such a point that the Deputy Chief Military Judge concluded on June 17, 2019, that the prosecution had shown that there could be reasons that could justify a recusal request with respect to Judge Pelletier (paragraph 94 of the recusal decision; paragraph 12 of the non-assignment decision).

[59] Pursuant to subsection 165.32(3) of the NDA, Judge Jocelyne Gagné was designated by the Chairperson of the Inquiry Committee, Chief Justice B. Richard Bell, to review the ethics

complaint and determine if an inquiry should be started. According to the news release of April 27, 2016, which was published on the CMAC website and a copy of which was given to the Court during the application for judicial review hearing, this complaint specifically concerned allegations of the breach of directive DAOD 5019-1.

[60] On February 29, 2016, the Chairperson of the Inquiry Committee advised Colonel Wakeham that no inquiry would be started and that the file would be closed following the acceptance by the Inquiry Committee of the recommendation of Judge Gagné. In the news release of April 27, 2016, it was mentioned that the ethics complaint was dismissed for the reason that it did not raise any cause for removal mentioned in subsection 165.32(7) of the NDA.

C. *Record of disciplinary proceedings and application to refer charges to a court martial*

[61] After the dismissal of the ethics complaint in February 2016, the military police continued its inquiry or took it up again (paragraph 17 of the recusal decision). It should be noted that the military police are under the command of the Canadian Forces Provost Marshall, who in turn acts under the general supervision of the Vice Chief of the Defence Staff (sections 18.3 and 18.5 of the NDA).

[62] To the charge of having conducted a personal relationship to the prejudice of good order and discipline (section 129 of the NDA), the military police gathered other evidence enabling them to lay charges of fraud (paragraph 117(a) of the NDA) and making a false statement in an official document (paragraph 125(a) of the NDA), as evidenced by the RDP dated January 25, 2018, prepared by an investigator from the Canadian Forces National Investigation

Service. Thus, in September 2015, the Chief Military Judge allegedly unduly claimed travel expenses and defrauded the government of an amount of less than $1,000 with respect to a claim that he reportedly made because of a temporary duty that he carried out as a military judge regarding a court martial that he presided at in August 2015. In this last case, Warrant Officer Dorval and retired Warrant Officer Michaud—a former court reporter with whom the accused had travelled—could be called as witnesses (see the RDP).

[63] Pursuant to an order dated January 19, 2018, the officer who is appointed to the position of Chief of Programme (C Prog.) and who holds a rank not below Major General/Rear-Admiral and the Vice Chief of the Defence Staff can respectively exercise the powers and qualifications of a commanding officer and a senior commander in respect of any disciplinary case against a military judge employed by the Office of the Chief Military Judge. As previously mentioned, the order dated January 19, 2018 was repealed and replaced by the order dated October 2, 2019, the same order which was declared inoperative in 2020 by Judges Pelletier and Sukstorf in the decisions *Pett* and *D'Amico.* It was the first time that military judges had been specifically targeted so as to confer disciplinary powers on those designated as commanding officer and senior commander of military judges.

[64] On February 5, 2018, Lieutenant-General J.A.J. Parent, Acting Vice Chief of the Defence Staff [the referral authority], approved the RDP and the recommendation made on January 30, 2018, by Major-General Jean-Marc Lanthier, Chief of Programme [the commanding officer], to defer the charges to the Director of Military Prosecutions [referral application letter]. In this case, the personal relationship that Colonel Dutil reportedly had in 2014-2015 allegedly adversely

affected the cohesion of the unit, which allegedly caused prejudice to the good order and discipline of the unit. For its part, the fraudulent claim allegedly constituted an abuse of trust. By asking the Director of Military Prosecutions to bring Colonel Dutil to a court martial, the referral authority therefore wished to ensure that if Colonel Dutil were found guilty, it would be understood that senior officers of the Forces are subject to the same standards of discipline as the officers and service members of the ranks under their command. In short, a conviction of Colonel Dutil by court martial would therefore send a clear, strong message of general dissuasion to all units of the Forces, including the Office of the Chief Military Judge (referral application letter at paragraph 8).

D. *Risk of conflict of interest in military prosecution*

[65] On January 30, 2018, pursuant to section 165.15 of the NDA and DMP Policy Directive Nos 016/17, Colonel B.W. MacGregor, acting in his capacity as Director of Military Prosecutions, appointed Lieutenant-Colonel Mark Poland—a member of the Reserve Force and a former Crown counsel of the Attorney General of Ontario (he has since become a judge of the Ontario Court of Justice)—as Special Prosecutor [the former Special Prosecutor].

[66] Therefore, no legal officer from the office of the Director of Military Prosecutions or the Office of the Judge Advocate General signed the preferred charge sheet. Nevertheless, the Special Prosecutor is required to apply all Director of Military Prosecutions policy directives at all steps of the pre-charge screening, post-charge review and court martial process unless the policy would require the Special Prosecutor to take action that would be inappropriate in the circumstances (section 14 of DPM Policy Directive Nos 016/17).

[67] On July 31, 2018, following Colonel Dutil's choice concerning the language of proceedings (section 110.08 of the QR&O), Second Lieutenant Cimon Senécal—a member of the reserve Force and Crown counsel at the office of the Director of Criminal and Penal Prosecutions of Quebec—replacing Lieutenant-Colonel Poland, was appointed Special Prosecutor [the new Special Prosecutor]. Furthermore, a legal officer from the Canadian Military Prosecution Service, Major Henri Bernatchez, was also designated by the Director of Military Prosecutions to assist the new Special Prosecutor.

E. *Preferred charge sheet*

[68] On June 10, 2018, pursuant to section 165 of the NDA, the former Special Prosecutor filed with the Court Martial Administrator preferred charges in English, including eight counts, six months after the charges were laid by the defence staff.

[69] One month later, on August 3, 2018, the new Special Prosecutor filed a new preferred charge sheet in French to the same effect as the previous one:

a) The first four counts related to charges of making a false entry in an official document in contravention of paragraph 125(a) of the NDA (first and second counts), of fraud in contravention of section 130 of the NDA and paragraph 380(1)(b) of the *Criminal Code*, RSC 1985, c C-46 (third count), and an act of a fraudulent nature not particularly specified in sections 73 to 128 of the NDA in contravention of section 117 of the NDA (fourth count) following the travel expense claim in September 2015.

b) The four other counts that follow relate to charges of conduct or negligence to the prejudice of good order and discipline in contravention of section 129 of the NDA, following the personal relationship that Colonel Dutil allegedly had in 2014 and 2015 with Warrant Officer Dorval (fifth, sixth, seventh and eighth counts).

[70] Of course, they were only charges that would have to be proved beyond all doubt by the prosecution during the trial of Colonel Dutil before the Court Martial. At the risk of repeating it, not only must Colonel Dutil be presumed innocent until proven guilty, but he has the right to be judged according to law in a fair and public hearing by an independent and impartial tribunal (section 11(d) of the Charter).

F. *Conflict of interest risk of the Chief Military Judge*

[71] On June 14, 2018, Lieutenant-Colonel d'Auteuil (appointed military judge on May 18, 2006) became the Deputy Chief Military Judge. On June 15, 2018, following the filing of the preferred charge sheet in English, the Chief Military Judge delegated to the Deputy Chief Military Judge his authority to assign military judges to preside at courts martial and all other judicial hearings as well as all general supervision of the Court Martial Administrator (double delegation of authority pursuant to sections 165.26 and 165.27 of the NDA).

[72] Such a delegation clearly had the purpose of avoiding a conflict of interest, real or apparent, of the Chief Military Judge and protecting the judicial independence of the Office of the Chief Military Judge. There is no doubt that if Colonel Dutil had presided when charges were

outstanding, an accused person could have requested his recusal because of the pressure exerted on him and the appearance of partiality that this situation was likely to create (*Pett* at paragraphs 47-48, 61-62, and 107-110). The delegation of authority of June 15, 2018 was not revoked by the Chief Military Judge. Moreover, it does not seem that the Deputy Chief Military Judge assigned the Chief Military Judge to preside at courts martial or any other judicial hearings since he was charged, the last indexed decision being dated December 4, 2017.

[73] As Colonel Dutil specified during the *voir dire*, if he delegated his authority as Chief Military Judge to Judge d'Auteuil, it was not because he had been appointed Deputy Chief Military Judge a few days earlier. Rather, it was because it was Judge d'Auteuil (*voir dire* transcripts at page 67). And it was not the first time. Such delegations of authority—later revoked—had previously been carried out in this file (recusal decision at paragraphs 12 and 22).

G. *Conflict of interest risk of the Court Martial Administrator*

[74] We noted it above. The Court Martial Administrator acts under the general supervision of the Chief Military Judge (subsection 165.19(3) of the NDA). However, Ms. Morrissey, the current Court Martial Administrator, was personally involved in this file (she is the one who reportedly took measures to transfer Warrant Officer Dorval to another unit) and would be called as a witness by the prosecution (paragraph 82 of the recusal decision). All of this creates an appearance of a conflict of interest.

[75] Pursuant to section 165.2 of the NDA, the Court Martial Administrator therefore authorized another person from the Office of the Chief Military Judge, Michel Saindon [Acting

Administrator] to carry out the duties of the Court Martial Administrator in this file on an acting basis.

H. *Coordination conferences and pre-trial conferences*

[76] On September 21, 2018, the prosecution, by mutual agreement with the defence, set the date of the convening of Colonel Dutil before the Court Martial at June 10, 2019, or nine months later (transcript of the conference of September 21, 2018 at pages 8-13).

[77] Colonel Dutil has always been transparent in terms of his intentions.

[78] All the coordinating and pre-trial conferences were held without prejudice to the right of the accused to request at the opening of the trial his recusal and that of any other military judge then on duty (transcript of the conference of September 6, 2018 at pages 16-20; transcript of the conference of September 21, 2018 at pages 2-3).

[79] Furthermore, Colonel Dutil also made it known that he was going to assign military judges as witnesses, notably to come and explain to the Court Martial the functioning of the Office of the Chief Military Judge and how it worked in practice (transcript of the conference of September 6, 2018 at page 17). In fact, the Deputy Chief Military Judge received a summons on June 6, 2019 (summons and certificate of service, Exhibits VD 1-4 and VD 1-5).

[80] As for Judge Sukstorf, throughout the discussions that the attorneys had with the Deputy Chief Military Judge, it was taken for granted that she did not have sufficient linguistic

ability to preside at a contested trial in French and that she would not be assigned (transcript of the conference of September 6, 2018 at pages 5, 6, 9 and 19; transcript of the conference of January 8, 2019 at pages 10-11; transcript of the conference of April 12, 2019 at pages 35-36).

[81] On May 1, 2019, the prosecution announced its intention of withdrawing, at the opening of the trial, four of the eight counts: 1) the first count concerning one of the two charges of having made a false statement; 2) the sixth, seventh and eighth counts of negligence to the prejudice of good order and discipline (record of the pre-trial teleconference of May 1, 2019 at pages 2-11).

[82] Three of the four counts withdrawn concerned the personal relationship that Colonel Dutil allegedly had with a subordinate in 2014 and 2015: the failure to comply as a commanding officer with the requirements of DAOD 5019-1 (sixth count); not to have properly reported the personal relationship that he had with his subordinate (seventh count); and not to have ended the command relationship between himself and his subordinate (eighth count).

[83] Nevertheless, Colonel Dutil is still accused of conduct to the prejudice of good order and discipline (section 129 of the NDA), in that, between autumn 2014 and September 2015, in Gatineau, Quebec, as well as in other places, when he was the commanding officer of the Office of the Chief Military Judge, he had a personal relationship with Warrant Officer Dorval, a person under his command (fifth count). Is it a minor offence? What is the objective seriousness today of the act for which Colonel Dutil is reproached?

[84] If we give credence to the intention expressed on May 1, 2019, by the Special Prosecutor, the prosecution will not present any evidence at trial on the command and subordination relationships, but will seek a special finding of guilty pursuant to section 138 of the NDA. Therefore, the simple fact of having had a personal relationship with another service member would be sufficient to obtain a finding of guilty (pre-trial teleconference record of May 1, 2019 at pages 4 and 5). Of course, the defence attorney already announced that he would object at the trial to this manner of proceeding (page 6).

I. *Convening of the court martial of Colonel Dutil*

[85] Initially convened by the Acting Court Martial Administrator to a General Court Martial (convening order of January 17, 2019), following the choice expressed by Colonel Dutil, the accused was finally convened on June 10, 2019, to a Standing Court Martial (convening order of May 2, 2019) (paragraph 36 of the recusal decision).

[86] Incidentally, we live by the standard of the judgment *R v Jordan*, 2016 SCC 27 [*Jordan*], which sets out a presumptive ceiling beyond which delay—from the charge to the actual or anticipated end of trial—is presumed to be unreasonable, unless exceptional circumstances justify it. According to the understanding of the Court Martial, this presumptive ceiling is 18 months. The presumptive period began when, following the charges formulated January 25, 2018, the Director of Military Prosecutions was seized with the file (*R v Thiele*, 2016 CM 4015 at paragraphs 21, 30, 31 [*Thiele*]); recusal decision at paragraphs 21, 29 and 89). As a consequence, on the date that the trial began before the Court Martial, June 10, 2019, nearly 17 months had already elapsed.

J. *Notice of objection*

[87] On May 9, 2019, counsel for Colonel Dutil formally served the prosecution with an objection, presentable at the beginning of the trial, June 10, 2019.

[88] On May 23, 2019, Commander Deschênes was appointed a military judge.

[89] The next day, during the pre-trial teleconference, the Special Prosecutor proposed that the newly appointed Judge Deschênes be quickly assigned to preside at the trial in the event that the Deputy Chief Military Judge decided to recuse himself. Counsel for Colonel Dutil and the Deputy Chief Military Judge expressed their surprise given that Judge Deschênes had already worked in the Office of the Chief Military Judge (pages 6-11 of the record of May 24, 2019).

K. *Beginning of the trial before the Court Martial*

[90] As set out in the notice to appear, Lieutenant-Colonel d'Auteuil, Deputy Chief Military Judge presided, as the assigned judge, at the Court Martial that started on June 10, 2019, and continued on June 10, 11, 12 and 17, 2019.

[91] First, the matter of Colonel Dutil's appearance in civilian or military dress was raised. The defense's application for an exemption from military dress requirements raised, from the start of the trial, the tricky question of the judicial independence of the Office of the Chief Military Judge. The prosecution insisted that Colonel Dutil wear his military uniform. A military judge's image of impartiality is commonly associated with the wearing of civilian dress instead of judicial robes. This will set the tone for the practical difficulties that the Court Martial faces

when a military judge—in this case, the Chief Military Judge—is on trial. The actions of military judges are likely to influence the perception of their independence and impartiality. In this case, the Deputy Chief Military Judge authorized Colonel Dutil to exercise his discretion about whether or not to wear a military uniform when appearing as the accused before the Court Martial pursuant to the principle of independence and impartiality associated with his role as a military judge (*R v Dutil*, 2019 CM 3002 [uniform decision]).

[92] The morning of June 10, 2019, the prosecution officially withdrew charges 1, 6, 7 and 8 of the preferred charge sheet (affidavit of Larry Langlois at paragraph 33, and audio recording of the hearing on June 10, 11 and 12, 2019, exhibit LL-26). The prosecution also stated its intention to amend, by consent, the third charge to reduce the amount indicated ($927.60).

[93] As previously stated, Colonel Dutil formally requested the recusal of the Deputy Chief Military Judge (paragraph 112.05(3)(b) of the QR&O).

[94] Courts Martial issues are public. Media representatives were therefore able to attend the hearings surrounding the *voir dire*. No confidentiality order was issued with respect to the documents filed at this time under the court martial, other than a non-publication order issued by the Deputy Chief Military Judge regarding the full testimony of Colonel Dutil and Ms. Morrissey. The non-publication order was cancelled at the hearing of June 17, 2019. Furthermore, no request was made before the Federal Court to issue a confidentiality order.

L. *Broad nature of the evidence and submissions to the Court Martial*

[95] During the *voir dire*—which required three hearing days—the defense heard testimony from the Chief Military Judge and Court Martial Administrator. They were both cross-examined at length by the Special Prosecutor. The prosecution did not call any witnesses. However, at the request of the prosecution, the Deputy Chief Military Judge allowed the Special Prosecutor to question Colonel Dutil about his relationship with the other military judges. In effect, the Special Prosecutor stated that this evidence was relevant to show that the Deputy Chief Military Judge should preside at the trial in accordance with the doctrine of necessity (transcript of the *voir dire* at pages 99-122). In fact, the evidence and the prosecution's submissions addressed not only the specific reasons for recusal of the Deputy Chief Military Judge (transcript of the *voir dire* at pages 75-91), but also the animosity and strained relations between the Chief Military Judge and Judge Pelletier (transcript of the *voir dire* at pages 107-112), and the involvement Judge Deschênes may have had in the file when she was a legal adviser (transcript of the *voir dire* at pages 120-122).

[96] The defense specifically invoked several recusal reasons in calling for the recusal of the Deputy Chief Military Judge: (1) the institutional ties arising from the administrative relationships between the two judges with respect to the approval of expense accounts and training activities; (2) the longstanding personal friendship between the two judges; (3) the Deputy Chief Military Judge's personal knowledge of the facts underlying the offences Colonel Dutil was accused of; (4) the Deputy Chief Military Judge's personal knowledge of some of the prosecution's witnesses; (5) the fact that the Deputy Chief Military Judge, himself, received a subpoena and would be called to testify at the trial.

[97] As for the prosecution, it opposed the objection by pointing out that there was sufficient institutional independence between the Deputy Chief Military Judge and the Chief Military Judge; that there was no reasonable apprehension of bias; that even if the Deputy Chief Military Judge could testify, it had not been shown that his testimony would be relevant and substantial. But the most important factor is this: if the Deputy Chief Military Judge felt that there are personal recusal reasons, the doctrine of necessity required that he still continue to preside at Colonel Dutil's court martial. In effect, it is likely that there are reasons of bias or incapacitation with respect to the other military judges which would also allow them to recuse themselves in turn. Consequently, his decision to recuse himself could make it impossible to conduct the trial within a reasonable time frame (transcript of the *voir dire* at pages 182, 193; transcript of the conference of April 12, 2019 at pages 35-38).

M. *Inseparable nature of recusal and non-assignment decisions*

[98] On June 17, 2019, the Deputy Chief Military Judge recused himself. His decision was read at the hearing. The written reproduction includes 110 paragraphs of reasons. This decision is not being challenged today by the applicant.

[99] Still during the public hearing and immediately after the reading of the recusal decision, the Deputy Chief Military Judge read the letter dated June 17, 2019—the non-assignment decision. The letter was labelled as an exhibit and placed in the Court Martial file (record of June 17, 2019 at pages 276-282). This is the decision being challenged today by the applicant.

[100] Lastly, after the reading of the impugned decision, the trial was adjourned to an indeterminate date. The Deputy Chief Military Judge determined that his recusal did not affect the convening order issued by the acting Court Martial Administrator (paragraphs 102-105 of the recusal decision). The trial before the Court Martial will therefore be able to proceed, in due course, before another military judge, if necessary.

V. **This application for judicial review**

[101] The applicant is adopting a clear, frank and unequivocal position that allows the federal board, commission or other tribunal no discretion whatsoever. The Deputy Chief Military Judge—to whom, on June 15, 2018, Colonel Dutil delegated his powers pursuant to sections 165.26 and 165.27 of the NDA—has the legal obligation, under section 165.25 of the NDA, to appoint a replacement from the other military judges, regardless of whether there are recusal reasons or insufficient language skills for each of them. The applicant is entitled to a writ of *mandamus*. Alternately, the impugned decision is also unreasonable and must be set aside.

[102] The application for judicial review is being challenged by the respondents. First, the impugned decision is not reviewable because it falls under the exercise of a judicial office specific to a superior court. Otherwise, the Federal Court has no jurisdiction pursuant to section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7) [FCA]. Alternately, the Deputy Chief Military Judge did not usurp his powers under section 165.25 of the NDA, and the impugned decision is reasonable, whereas the conditions for issuing a writ of *mandamus* have not been met (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, [1993] FCJ No 1098 [*Apotex*]).

[103] Having considered in their entirety the application and response files, evidence submitted by the parties, counsel's written and oral submissions, as well as relevant case law, there are no grounds to intervene and none of the remedies sought by the applicant will be granted by the Court today. On the one hand, the impugned decision is reviewable and the Federal Court has jurisdiction in this case. On the other hand, any legal obligation arising from section 165.25 of the NDA must be exercised in a manner consistent with the fundamental rights of the accused. No power was usurped by the Deputy Chief Military Judge. The impugned decision is reasonable: it rests on the evidence before the Court Martial and is based on a reasonable apprehension of bias or insufficient language skills. Either way, it is the only decision that can be made by the Deputy Chief Military Judge in this case, whereas all the remedies sought by the applicant must be denied.

[104] The specific reasoning used by the Court to reach this result and these conclusions is set out in the following sections.

VI. Reviewability of the impugned decision and statutory jurisdiction of the Federal Court

[105] Under sections 18 and 18.1 of the FCA, the Federal Court has exclusive original jurisdiction to issue, among other things, *certiorari* and *mandamus* orders against any federal board, commission or other tribunal, which the applicant is seeking in this case. However, the respondents first pointed out that the impugned decision is not reviewable because the Deputy Chief Military Judge has privileges of a superior court or this Court does not, otherwise, have jurisdiction under section 18.5 of the FCA.

[106] It is appropriate to dismiss these claims which are not founded in law.

A. *Reviewability of the impugned decision*

[107] The specific qualification of the act—legislative, administrative, judicial or arising from royal prerogative—is irrelevant with respect to judicial review. In effect, this rests on constitutional necessity—in the name of the rule of law and the principle of the separation of powers—that the courts or a superior body be able to verify the legality of any decision rendered by a lower court (*Turp v Canada (Foreign Affairs)*, 2018 FC 12 at paragraph 118; *MacMillan Bloedel Ltd v Simpson*, 1995 CanLII 57 (SCC), [1995] 4 SCR 725 at paragraph 34; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraphs 27-31, *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750 at paragraph 13).

[108] In this case, the broad definition found in section 2 of the FCA applies to the impugned decision and encompasses the exercise—and even the non-exercise—of all jurisdiction or power set out in a federal act (*Canada (Attorney General) v TeleZone*, 2010 SCC 62 at paragraph 50).

[109] On the one hand, military judges are appointed by the Governor in Council under section 165.21 of the NDA and, in the case of the Chief Military Judge and the Deputy Chief Military Judge, under sections 165.24 and 165.28 of the NDA. Although a military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction (section 165.231 of the NDA), they are not persons appointed under section 96 of the *Constitution Act, 1867*, 30-31 Victoria, c 3 (UK).

[110] On the other hand, under section 165.25 of the NDA, the military judge tasked with presiding at a court martial and conducting judicial hearings in a given file is usually assigned by the Chief Military Judge. Furthermore, the Chief Military Judge is allowed to delegate his or her power to assign to any military judge, other than a reserve force military judge. This is expressly set out in section 165.26 of the NDA.

[111] Since the decision to assign a military judge to preside at a court martial and conduct judicial hearings constitutes a presumed exercise of a jurisdiction set out in section 165.25 of the NDA, therefore, the Deputy Chief Military Judge's decision not to assign another military judge on June 17, 2019, is reviewable by the Federal Court (*Rushnell v Canada (Attorney General*, [2001] FCJ No 366 at paragraph 12 [*Rushnell*]; *Forsyth v Canada (Attorney General)*, [2003] 1 FC 96 at paragraph 10 [*Forsyth*]; and *Director of Military Prosecutions v Chief Military Judge*, 2007 FCA 390 [*Director of Military Prosecutions*]).

B. *Limited scope of section 18.5 of the FCA*

[112] The Deputy Chief Military Judge also claims that the recusal decision could be appealed before the CMAC, which is being challenged by the applicant. Since the non-assignment decision cannot be separated from the recusal decision, this Court would not have jurisdiction to hear the application for judicial review under section 18.5 of the FCA. Colonel Dutil did not specifically take a position on the jurisdiction of the CMAC but recalled that the issues in the context of this application for judicial review are the same as those considered by the Deputy Chief Military Judge with respect to the objection.

[113] Section 230.1 of the NDA governs the Minister's right to appeal to the CMAC. With the exception of the cases expressly mentioned in this provision, such as the stay of proceedings because an accused is unfit to stand trial (subsection 202.121(7) of the NDA), there is generally no appeal of an interlocutory decision (see *Rushnell* at paragraph 12). Furthermore, it is not clear that the recusal decision is, itself, appealable because it does not seem to fall under one of the reasons listed in section 230.1 of the NDA. And we must remember that there is no right to appeal without a legislative text (*Kourtessis v MNR*, 1993 CanLII 137 (SCC), [1993] 2 SCR 53 at pages 69-70; *Elitis Pharma inc v RX Job inc*, 2012 QCCA 1348 at paragraph 25).

[114] The Deputy Chief Military Judge specifically invokes paragraph 230.1(d) of the NDA. This provision authorizes an appeal as it pertains to "the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge." In this respect, we do not fall into this frame of reference.

[115] In this case, section 186 of the NDA allows a military judge to recuse himself. The recusal decision that was not challenged by the prosecution did not terminate the proceedings. Nor does it constitute a failure of the Court Martial to exercise its jurisdiction with respect to the charges brought against Colonel Dutil by the Director of Military Prosecutions. The replacement of the recused judge will be carried out in accordance with the regulatory procedure, as needed. Because Colonel Dutil's trial was adjourned after the recusal, in accordance with subsection 112.14(6) of the QR&O, it cannot be said, in this case, that the Court Martial refused or failed to exercise its jurisdiction. The problem is that there is no other judge who is impartial, independent and currently able to preside at the trial in French. If a new military judge from the

regular force is appointed under section 165.21 of the NDA, or if a military judge from the reserve force is appointed under section 165.22 of the NDA, it will be lawful for the Deputy Chief Military Judge to exercise jurisdiction under section 165.25 of the NDA, and the trial will be able to resume before the court martial.

[116] Lastly, because Parliament took the trouble to mention in section 18.5 of the FCA that it is "if an Act of Parliament expressly provides for an appeal" [my emphasis], it would be contrary to the wording of the Act and to the interest of the administration of justice for this Court not to exercise its jurisdiction under sections 18 and 18.1 of the FCA because a right of appeal could implicitly exist under the NDA.

[117] Therefore, today, we must dismiss any declinatory exception to jurisdiction based on section 18.5 of the FCA. At the same time, since no appeal—or permission to appeal after the deadline—has been filed to date on behalf of the Minister, and considering the fact that the Federal Court hears applications for judicial review without delay and in a summary way (subsection 18.4(1) of the FCA), it is not in the interest of justice to order a stay of proceedings in this file under section 50 of the FCA.

VII. **Standard of review**

[118] This is an application for judicial review from a reasoned decision rendered on June 17, 2019, by the Deputy Chief Military Judge. This is not a case of a delay by a federal board, commission or other tribunal in rendering a decision affecting a parties' rights.

[119] In short, the applicant is challenging both the legality and the reasonability of the non-assignment decision [the impugned decision]. In his notice of application for judicial review dated July 16, 2019, he claimed that the Deputy Chief Military Judge: 1) acted beyond his jurisdiction or refused to exercise his jurisdiction under section 165.25 of the NDA by not assigning another military judge; 2) erred in law in making a decision by ruling on the appearance of bias or insufficient language skills of the other available military judges or, alternately, by not taking into account the doctrine of necessity to assign another military judge; 3) based his decision on an erroneous finding of fact that he made in a capricious manner or without regard for the material before him.

[120] Although these are reasons for judicial review that are explicitly referred to in paragraphs 18.1(4)(a), (c) and (d) of the FCA, this does not dispense this Court from determining the standard of review applicable to the impugned decision (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). The question of whether—assuming the Deputy Chief Military Judge made a reviewable error—the Court must issue a writ of *mandamus* or of *certiorari*, or return the matter to the decision-maker with directions, as explicitly allowed by subsection 18.1(3) of the FCA, is left entirely to the Court's discretion. Therefore, the standard of review must not be confused with the remedial powers of the Court.

[121] As the Supreme Court noted in December 2019 in *Vavilov*, the new revised framework "starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (at paragraph 16). That is indeed the case concerning the

Deputy Chief Military Judge's specific reasons for not assigning the other eligible military judges after recusing himself.

[122] On the other hand, this matter presents unique challenges to the Canadian military justice system. The current process for convening a court martial and assigning a military judge to preside at the court martial is seriously undermined when the Chief Military Judge—or his or her designate—has a conflict of interest or when there are no impartial military judges with the required language skills. Also, in our view, the legal effect of the power to assign under section 165.25 of the NDA falls into the category of general questions of law "of central importance to the legal system as a whole" (*Vavilov* at paragraphs 17, 53, 58-62). In such cases, a single determinate answer is required (*Vavilov* at paragraph 62).

VIII. **Correct interpretation of section 165.25 of the NDA**

[123] Section 165.25 of the NDA reads as follows:

165.25 The Chief Military Judge assigns military judges to preside at courts martial and to perform other judicial duties under this Act.	165.25 Le juge militaire en chef désigne un juge militaire pour chaque cour martiale et lui confie les fonctions judiciaires prévues sous le régime de la présente loi.

[124] Preliminary note: The parties agree that it is not appropriate for the superior courts to interfere in the choice that the Chief Military Judge—or his or her designate—may make when assigning one military judge rather than another to preside at a Court Martial that has yet to be convened by the Court Martial Administrator. In principle, assigning a competent judge to hear a case is the exclusive prerogative of the Chief Justice and an executive function that is essential to

the proper functioning and independence of any court of law. Allowing the executive a role in selecting what judges hear what cases would constitute an unacceptable interference with the independence of the judiciary (*MacKeigan v Hickman*, [1989] 2 SCR 796 at paragraph 71).

[125] Nonetheless, in this case, the applicant submits that the situation is different in circumstances where no military judge is assigned under section 165.25 of the NDA. According to the applicant, the question here is not to invalidate the Deputy Chief Military Judge's administrative decision to assign one military judge rather than another to hear a case, but rather to sanction his refusal, after recusing himself, to assign a replacement judge from the other three available judges. We are therefore dealing with a refusal to perform a legal duty, if not a usurpation of power, because it is only the judge assigned by the Deputy Chief Military Judge who can recuse himself or herself in response to a new objection brought before him or her. No other military judge may be "recused" in advance by the Deputy Chief Judge. This would be usurping the assigned judge's power to recuse himself or herself. In short, section 165.25 of the NDA does not grant any discretion. The assignment of a military judge is automatic: it is an absolute legal obligation. Consequently, there is no need to go any further. Full stop.

[126] For their part, the respondents point out that the right to an independent and impartial tribunal is protected under the Constitution and that all judges are required to adhere to this principle in the decisions they may make. Also, when exercising his or her roles, including the role to assign, the Deputy Chief Military Judge must protect judicial independence and make a decision while respecting the accused's right to an impartial, independent and competent tribunal capable of hearing a case in the language chosen by the accused.

[127] This Court cannot agree with the applicant's narrow and restrictive interpretation of the power under section 165.25 of the NDA. The applicant submits that the word "désigne" in French—which is translated in English by the word "assigns"—has an imperative character and accordingly creates a legal obligation. Counsel for the applicant relies on the French version of section 11 of the *Interpretation Act*, RSC 1985, c I-21: « L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions » [emphasis added]. However, the English version of section 11 of the *Interpretation Act* is different and appears more restrictive since there is no mention to the present tense of the verb. In effect it simply provides: "The expression "shall" is to be construed as imperative and the expression "may" as permissive" [emphasis added].

[128] Moreover, the text of section 165.25 of the NDA must be interpreted not only in accordance with the rules governing bilingual statutes but within the larger framework of the modern rule that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Khosa* at paragraphs 38 and 40). Here the English version cannot be read so as to compel the Chief Military Judge to assign a military judge if a valid reason for not doing so exists or for waiting a certain time before doing so. Otherwise, the words "shall assign" [emphasis added] would have been used in the English version of section 165.25 of the NDA.

[129] Nonetheless, no obligation exists in absolute terms. Any circular reasoning based on the assertion that “an order is an order” or “an obligation is an obligation” has no place in a legal world governed by the rule of law. To be legal, an obligation has to be consistent with the Constitution. Let us not forget that the Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect (subsection 52(1) of the *Constitution Act, 1982*). In this case, a constitutional interpretation of section 165.25 of the NDA must implicitly include the following legal limitation: the exercise of the power to assign must be consistent with the Charter and not result in a miscarriage of justice for the accused. (See also *Doré v Barreau du Québec*, 2012 SCC 12 at paragraph 24; *BCGEU v British Columbia (Attorney General)*, 1988 CanLII 3 (SCC); *El-Alloul c Procureure générale du Québec*, 2018 QCCA 1611 at paragraph 75). Accordingly, section 165.25 of the NDA empowers the Chief Military Judge—or his or her designate—to assign a military judge from the military judges for whom there is no known particular legal ground of disability or incapacitation.

[130] Moreover, while the laying of charges against Colonel Dutil seems to suggest that no one—not even the Chief Military Judge—is above the law, the fact remains that he must be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal (paragraph 11(d) of the Charter). Equality before the law cannot be understood any other way. In addition, Colonel Dutil must be tried within a reasonable time. And since he validly chose French as the language of trial, the military judge assigned to preside at the Court Martial must be able to understand French without the assistance of an interpreter (paragraph 16(1)(b) and subsection 3(2) of the OLA; *Girouard v Canada (Attorney*

General), 2019 FC 1282 at paragraph 207). These are fundamental, non-negotiable rights that cannot be restricted for reasons of administrative convenience, such as a shortage of military judges (*R v Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768 [*Beaulac*]).

[131] This leads us to analyze the Deputy Chief Military Judge's reasons for recusing himself and why he concretely made the "difficult" decision not to assign a replacement judge from the other three eligible military judges.

IX. **Reasonableness of the impugned decision**

[132] The impugned decision is reasonable in all respects and does not otherwise contain a reviewable error of law or fact affecting the ultimate result and justifying the intervention of this Court.

A. *Preliminary observations*

[133] In this case, where the doctrine of necessity is invoked at will before both the Court Martial and this Court, one cannot ignore the Deputy Chief Military Judge's reasons for recusing himself to prevent a flagrant injustice from being done to the accused. The impugned decision has the same legitimate objective and is intimately related to the administration of military justice, the necessary maintenance of the independence of the Court Martial, and the image of impartiality of military judges. It is much more than a marching order. It seems that the Deputy Chief Military Judge sought to stir the pot or, better yet, issue a warning to assert the independence of the Office of the Chief Military Judge and to publicly alert the appropriate

authorities to the current shortcomings and limitations of the law when the accused is a military judge.

[134] However, it is not disputed that a chief justice, regardless of the court in question, has some discretion in assigning the judges that will preside over the hearings before his or her court. Basically, it will be accepted without challenge that a chief justice may consider the schedules and qualifications of his or her judges when assigning the cases to be heard. Similarly, if a clear and apparent conflict of interest is already known to the Chief Justice (for example, the judge's spouse represents or is a party before the Court), it goes without saying that the judge in question will not be assigned to hear the case. In this case, the evidence in the record amply supports the apprehension of bias or injustice raised by the Deputy Chief Military Judge.

[135] However, a word of caution: This is an exceptional case. No general rule applicable to all chief justices can be distilled. What is extraordinary is also the combination of unprecedented factors. As the judge assigned to preside at the court martial of Colonel Dutil, the Deputy Chief Military Judge personally decided on the probative value of the evidence and arguments presented at the *voir dire* and had to consider the doctrine of necessity raised by the Director of Military Prosecutions. Under the circumstances, it became clear that the only other eligible military judges—Judges Pelletier, Sukstorf and Deschênes—could not hear the case. Normally, the Chief Justice does not have this type of information when assigning a judge to hear a case (unless a judge came forward beforehand to inform the Chief Justice of a ground of incapacitation).

B. *Deputy Chief Military Judge's personal reasons for recusal*

[136] In simple terms, the Deputy Chief Military Judge concluded that Colonel Dutil had shown, on a balance of probabilities, that a fully informed person having thought the matter through in a realistic and practical way would conclude that he is biased (paragraph 84 of the recusal decision). Indeed, the Deputy Chief Military Judge considers that his friendship with the accused (paragraphs 73, 75 and 76 of the recusal decision) and the fact that he might testify at his trial (paragraphs 76 and 83 of the recusal decision) are in themselves sufficient grounds for recusal, even if the institutional relationships between the Chief Military Judge and the military judges, including himself, are not enough to constitute grounds for recusal (paragraphs 63-72 of the recusal decision).

[137] In fact, the Deputy Chief Military Judge has become a personal friend and confidant of Colonel Dutil over time and helped him manage his relationship with Warrant Officer Dorval after things ended between them. The professional and support interactions during more difficult family situations on both sides were also corroborated by Ms. Morrissey (paragraphs 14, 15 and 16 of the recusal decision). And, regarding his subpoena as a defence witness at the trial, the Deputy Chief Military Judge is satisfied that it has been shown that his testimony could be relevant and substantial for some of the offences. Whether it relates to the existence or non-existence of a relationship between Colonel Dutil and Warrant Officer Dorval and the nature of the relationship itself, or to the performance of Colonel Dutil's temporary duty (which forms the basis of the fraud and false statement charges concerning his claim), his subpoena as a witness is justified and is simply not a roundabout way to select one military judge or another.

C. *Previous relationships with court reporters and the Court Martial Administrator: a systematic factor tainting the impartiality of military judges who are working or have worked at the Office of the Chief Military Judge*

[138] In addition, the Deputy Chief Military Judge noted that the fact that some witnesses who are working or have worked at the Office of the Chief Military Judge—particularly court reporters and the Court Martial Administrator—was a serious factor to be considered, because it is very difficult to disregard those close ties in assessing the reliability and credibility of the witnesses (paragraphs 77-82 of the recusal decision). Not only is it a relevant consideration in terms of the apprehension of bias raised against the Deputy Chief Military Judge, but it also applies just as much to other military judges.

[139] In this regard, the Deputy Chief Military Judge notes that a relationship of trust between the military judge and the court reporter is essential to the proper functioning of the court martial (paragraph 78 of the recusal decision). Thus, the judge has to know more about the court reporter than a normal professional relationship would require. This trust is similar to that often shared between two soldiers on service. They have to know each other enough to be efficient in their respective duties (paragraph 79 of the recusal decision).

[140] In particular, for those witnesses who are former court reporters, the Deputy Chief Military Judge concludes that it would be difficult to believe that he could ignore his familiarity with these people, despite some time having passed, to be able to assess their credibility and reliability in this matter (paragraph 80 of the recusal decision). The same goes for Warrant Officer Dorval, whom the Deputy Chief Military Judge knew personally (paragraph 81 of the recusal decision).

[141] As for Ms. Morrissey, who will also be called as a prosecution witness, the Deputy Chief Military Judge notes that she will continue in the future to make decisions, as Court Martial Administrator, that could personally affect him in his role as a military judge. Ruling on the credibility and reliability of her testimony therefore includes an increased risk of her making retaliatory decisions or the fear of a negative impact on their working relationship (paragraph 82 of the recusal decision).

[142] These are external factors that could contribute to a reasonable apprehension of bias not only on the part of the Deputy Chief Military Judge but also on the part of the other eligible military judges, hence the decision not to assign them (paragraphs 11 and 14 of the non-assignment decision). This conclusion is not unreasonable; in fact, the Court is of the same view if, by chance, it is to substitute itself for the administrative decision-maker. The work environment and the relationships between individuals at the Office of the Chief Military Judge are an essential component of this case before the Court Martial.

[143] Moreover, as noted by counsel for Colonel Dutil in his notice of objection dated May 9, 2019, “prejudice of good order and discipline” is an essential element of the offence under section 129 of the NDA (*R v Tomczyk*, 2012 CMAC 4 at paragraphs 24-25; *R v Bannister*, 2019 CMAC 2 at paragraphs 44 *et seq*). Therefore, the trial judge will have to assess any direct evidence of actual prejudice or may infer prejudice as the natural consequence of proven acts. Of course, this legal exercise requires an impartial contextual analysis of all the evidence. This seems impossible if the military judge has personal knowledge of the context and the facts in issue and is potentially a material witness. This Court shares that view.

[144] The defence has already announced its intention to adduce contextual evidence at trial of the relationships between military judges and court personnel. It may reasonably be expected that a number of court reporters and military judges will therefore be called to the witness stand. Obviously, the trial judge will have to determine the credibility of the testimonies heard. However, a number of military judges are already aware of the allegations against Colonel Dutil and of the nature of the professional and personal relationship between him and Warrant Officer Dorval. This could distort their ultimate conclusion about the impact of this relationship on unit cohesion.

[145] A fully informed person having thought the situation through in a realistic and practical way would conclude that the previous relationships or close ties between the military judges and court reporters and the Judicial Administrator—who have to continue working together in the future and trust each other to do their work efficiently—are likely to influence or distort the judgment of the military judge assigned to hear the case, and raise a reasonable apprehension of bias. This is a general contaminating factor that requires quarantining all those concerned.

D. *Specific or additional reasons for not assigning Judges Sukstorf, Deschênes or Pelletier*

[146] To arrive at the conclusion not to assign any of the other three eligible military judges, the Chief Military Judge refers to the essence of the reasoning found in the recusal decision, which is based on the following elements, among other things:

a) Though she completed some second-language training and presided at a court martial in English where a witness gave brief testimony in French on a guilty plea and a joint submission on sentencing, Judge Sukstorf—whose mother tongue is

English—does not have sufficient proficiency in French to preside over this contested and complex case (paragraphs 19 and 94 of the recusal decision and paragraphs 5 and 6 of the non-assignment decision);

b) In addition to her acting as a legal adviser at the Office of the Chief Military Judge and her apparent involvement in the ethics complaint, Judge Deschênes will have to assess the credibility and reliability of witnesses with whom she has worked or will continue to have a professional relationship and could also be called as a defence witness, which raises a reasonable apprehension of bias (paragraphs 37, 80-82 and 94 of the recusal decision; paragraphs 14 and 15 of the non-assignment decision). Moreover, since Judge Deschênes has been appointed only recently, she would not have the required experience to preside at Colonel Dutil's trial;

c) Judge Pelletier's appointment also raises a reasonable apprehension of bias, mainly because of his past and apparently acrimonious relationship with the Chief Military Judge and his personal knowledge of the witnesses and of what was said about the difficulty to assess the credibility and reliability of people with whom he has worked and will continue to work, like the Court Martial Administrator, who will continue to make decisions that could affect him in his role as a military judge (paragraphs 12, 13, 80 to 82 and 94 of the recusal decision; paragraph 11 of the non-assignment decision).

[147] It is clear that Judge Deschênes's inexperience is not a reasonable ground not to assign her: a judge is a judge, and there is no training period where a judge is a novice or junior and

cannot hear certain cases. That being said, this ground, as articulated in the non-assignment decision, could reflect the concern of the Director of Military Prosecutions regarding the training that Judge Deschênes had to complete and that could delay Colonel Dutil's trial. However, this conclusion was not determinative, and there is no need here to deal with it any further.

[148] Notwithstanding the issue of Judge Deschênes's inexperience, the impugned decision is, on the whole, reasonable. It goes without saying that a conflict of interest, whether real or apparent, disqualifies at least two military judges currently in office: Judges Pelletier and Deschênes. This leaves Judge Sukstorf. The applicant would like Judge Sukstorf herself to decide the issue of her language skills. The applicant notes that in *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549 [*Société des Acadiens*], the Supreme Court stated that "a judge must assess in good faith and in as objective a manner as possible his or her own level of understanding of the language of the proceedings" (paragraph 155). That comment is not determinative, in the opinion of this Court.

[149] First, the right to a trial in the official language of one's choice has changed considerably since *Société des Acadiens*, especially in a criminal law context, which was not the context of that case (see, for example, *Beaulac*). Moreover, we do not believe that the Supreme Court rejected the possibility that a chief justice would himself or herself assess the language proficiency of his or her judges, when *Société des Acadiens* was decided against the backdrop of a party's request that another judge hear the case. On the contrary, Justice Wilson quoted with approval the following excerpt from *R v Tremblay*, 1985 CanLII 2711 (SK QB): "I have no

doubt that at the accused's hearing a bilingual judge will be provided by the Chief Justice, and there is no reason why bilingual court staff cannot be made available" [emphasis added].

[150] Regarding Judge Sukstorf's language skills, it is therefore clear that the decision falls within the proper administration of justice and the Deputy Chief Military Judge's power to assign. What is more, in the case of a federal court such as the Court Martial, it is the responsibility of its head—Chief Justice, Chairperson or designate—to ensure that the person assigned to hear the case can preside at the trial in English, French or both official languages, as applicable, without the assistance of an interpreter, when section 16 of the OLA applies.

[151] Ultimately, this Court must defer to the good judgment of the Deputy Chief Military Judge. First, throughout the preliminary discussions, it appears that the parties on the record always considered that Judge Sukstorf could not preside at the court martial of Colonel Dutil. At the very least, the Director of Military Prosecutions never objected to this. Second, even if Judge Sukstorf has occasionally, in a very limited way, heard brief testimony in French and even signed a decision written in French in a non-contested matter, the complexity of this case is a serious impediment. The Court sees nothing unreasonable in the Deputy Chief Military Judge's conclusion.

E. *Doctrine of necessity: non-application in cases of flagrant injustice*

[152] Following the *voir dire*, the Deputy Chief Military Judge found that the prosecution had demonstrated that there could be grounds to justify an objection regarding Judges Pelletier and

Deschênes, as Judge Sukstorf does not have sufficient language abilities to conduct a trial in French (paragraph 94 of the recusal decision).

[153] The fact remains, the Deputy Chief Military Judge concluded in the recusal decision, that the doctrine of necessity did not oblige him to continue to preside over the trial (paragraphs 85-101 of the recusal decision). Indeed, a new military judge (other than one of the three eligible military judges), or even a reserve military judge, can still be appointed by the Governor in Council and subsequently assigned by the Deputy Chief Military Judge to continue Colonel Dutil's trial at a court martial. That said, even if there would be some delay, the prosecution had known about this issue for some time already (paragraphs 91, 92, 96-97 of the recusal decision).

[154] Before this Court, the applicant pleaded in the alternative that the doctrine of necessity required the Deputy Chief Military Judge to assign one of the three eligible military judges—even if the grounds for non-assignment concerning each of them were reasonable—given the situation of necessity in the case at bar. In reality, the applicant is indirectly challenging the merits of the reasoning underlying the Deputy Chief Military Judge's reasoned decision to recuse himself and, therefore, not to assign Judges Sukstorf, Pelletier and Deschênes because of the evidence, troubling to say the least, adduced during the *voir dire*. Insofar as the applicant did not legally challenge the recusal decision, he should not be permitted to assert today, before this Court, the doctrine of necessity, which constitutes a collateral attack. Despite that, and if the Court must nevertheless decide this issue today, the doctrine of necessity is of no assistance to the applicant.

[155] In *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1998] 1 SCR 3 [*Reference of 1998*], the Supreme Court of Canada established certain scales for the application of the doctrine of necessity, and stated that it will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule does apply, it applies only to the extent that necessity justifies. These two limitations make clear that the doctrine should not be applied mechanically. To do so would gravely undermine the guarantee of an impartial and independent tribunal provided by section 11(d) of the Charter. In this case, the doctrine of necessity would not apply in a context of criminal or military justice where the fundamental rights of the accused may be irreparably compromised by the absence of an impartial and independent tribunal or by the language deficiency of the trial judge.

F. *The rule of law: the absolute rule of conduct*

[156] The applicant also argues that, given the strong presumption of impartiality to which judges are entitled (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at paragraph 59; *Apotex Inc v Sanofi-Aventis Canada Inc*, 2008 FCA 394 at paragraph 6), the Deputy Chief Military Judge should have given, successively, each of the three eligible judges the opportunity to preside over the hearing, hear an objection already announced, and to then decide whether or not he could hear the case. Therefore, until all of the available judges have recused themselves one by one, the Deputy Chief Military Judge would have to assign another replacement military judge. In the Court's view, not only does such an approach go against the interests of the administration of justice, but it completely discredits the image of the courts martial while considerably weakening

the institutional independence and the essential role of the Office of the Chief Military Judge in matters of military justice.

[157] One will agree that institutional independence includes administrative aspects that have a direct practical effect on the exercise of judicial functions, including assignment of judges, convening and the sittings of each court martial (*Valente v The Queen*, [1985] 2 SCR 673 [*Valente*]). And, moreover, a Court Martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to the enforcement of its orders and all other matters necessary or proper for the due exercise of its jurisdiction, and these latter powers also extend to each military judge for the exercise of his or her judicial duties (section 179 of the NDA).

[158] It must be noted that if the Deputy Chief Military Judge made the concrete decision, on June 17, 2019, to adjourn the matter before the Court Martial and to not assign a replacement judge among the three eligible military judges, it is not an act that was taken lightly. Quite the contrary. It is first and foremost to ensure the rule of law and to preserve the accused's right to a fair trial before an impartial and independent tribunal (paragraph 7 of the non-assignment decision). (See also *Ethical Principles for Judges*, Canadian Judicial Council, 2004: "Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary.") And, because the confidence of the public and of military personnel depends on, among other things, the impartiality of the military judge, that confidence could be undermined if a replacement military judge were assigned among those currently eligible (paragraphs 7, 8 and 16 of the non-assignment decision).

[159] Having considered all of the grounds for non-assignment in light of the evidence in the record and the applicable principles of law, this Court is not satisfied that the challenged decision is unreasonable, or that it is otherwise tainted by a reviewable error of law or fact affecting the final outcome and justifying the intervention of this Court.

X. **Exercise of judicial discretion with respect to the issuance of a *writ of mandamus* and remedial action**

[160] As explained above, there was no excess of jurisdiction or usurpation of power by the Deputy Chief Military Judge, and the challenged decision is reasonable in all respects. Consequently, the applicant has not satisfied this Court that a writ of *certiorari* or a writ of *mandamus* can be granted. Alternatively, the respondents have invited this Court to disallow, in any event, the remedies sought by the applicant in the exercise of its judicial discretion.

[161] The issuance of a writ of *mandamus* is not automatic and, moreover, the applicant must comply with several cumulative conditions (*Lukacs v Canada (Transportation Agency)*, 2016 FCA 202 at paragraph 29; *Apotex; Harelkin v University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561 at page 574):

> (1) there must be a legal duty to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there must be a clear right to performance of that duty;
>
> (4) where the duty sought to be enforced is discretionary, certain additional principles apply;
>
> (5) no adequate remedy is available to the applicant;
>
> (6) the order sought will have some practical value or effect;

> (7) the Court finds no equitable bar to the relief sought; and
>
> (8) on a balance of convenience an order of *mandamus* should be issued.

[162] First, the applicant must have a clear legal right. If there is a clear right to require the assignment of a judge, it must be of a public nature and the Director of Military Prosecutions may rely on it as the prosecutor. However, according to the principle of the rule of law, the simple fact that the decision-maker must comply with the Charter cannot constitute a refusal to perform a legal duty, such that a writ of *mandamus* cannot be issued by the Court in such a case.

[163] The applicant relies on *Director of Military Prosecutions* rendered by the Federal Court of Appeal. However, the decision must be read in its entirety. The first issue concerned the legality of the Chief Military Judge's decision not to appoint a military judge, because such an assignment went against the open court principle. But that matter is very different from this case.

[164] The Federal Court of Appeal ruled that the Chief Military Judge and the Applications Judge had both committed the same error of law by determining, from the start, that the sealing of the charge by the Director of Military Prosecutions for the brief period of time required for a military judge to rule on the issue of confidentiality, contravened the constitutional principle of an open court. The Federal Court of Appeal concluded that no alternate avenue was open to the Director of Military Prosecutions in the case of a "classified" charge. However, if the issue of disclosure could not be submitted at the preliminary stage to the permanent court martial in the manner suggested by the Director of Military Prosecutions, the accused would likely never have been brought before justice. The Federal Court of Appeal therefore reversed the trial decision

dismissing the application for judicial review. Without discussing or addressing the special conditions mentioned in *Apotex*, the Federal Court of Appeal issued a writ of *mandamus* ordering the Chief Military Judge to assign a military judge, and the Court Martial Administrator to convene a permanent court martial forthwith. Therefore, there is every reason to believe that if the constitutional principle of the open court—which had been raised prematurely—had been violated at the commencement of the trial by court martial, then the application for judicial review would have been dismissed and a writ of *mandamus* would not have been issued.

[165] It goes without saying that this case is different from *Director of Military Prosecutions* in many fundamental aspects. Non-assignment in the latter case occurred when the permanent court martial was not yet constituted. In the case at bar, Colonel Dutil's court martial has already been constituted and its proceedings have only been adjourned.

[166] Second, even if one were to assume for a moment that there could be a legal duty to act, it is clear here that the order of *mandamus* sought will have no impact on a practical level. In addition, this Court finds that the public considerations that are mentioned later prevent the applicant from obtaining the relief sought. Moreover, the balance of convenience is clearly in favour of the accused, Dutil.

[167] Let us be categorical: In this context, none of the three current military judges available can preside over Colonel Dutil's court martial without causing irreparable damage to the constitutional right granted to every accused, that is, the right to be tried by an independent and impartial tribunal. There is no possible proportionality or negotiation. In short, Judges Pelletier,

Sukstorf and Deschênes cannot hear the case and are tainted by their past conduct or the positions that they were able to adopt. In a potentially toxic environment, only a new decision-maker, from outside the Office of the Chief Military Judge, can remove the apprehension of bias already expressed by the Deputy Chief Military Judge. The evidence that was submitted during the *voir dire* is indeed eloquent and speaks for itself.

[168] The Office of the Chief Military Judge is a rather small unit of the Forces. It is clear that Colonel Dutil, who allegedly is its "commander" (which is challenged by the accused), has become an inevitable centre of attraction and that the charges have polluted the work environment and the relations of the officers and military personnel who are part of the workforce of the Office of the Chief Military Judge. Rumours. Information. Odds are that everyone has already formed an opinion. That includes, of course, the military judges. All of this is extremely damaging to the proper administration of the courts martial and the presumption of impartiality of its members. The strong presumption of impartiality has its limits. How can a military judge in office, today, argue seriously and with aplomb, that he has the distance and serenity required to exclude everything he may have already heard or seen? Do Judges Pelletier, Sukstorf and Deschênes really need to be assigned again by the defence, in turn, as part of a new *voir dire*, following an order of *mandamus* from this Court obliging the Deputy Chief Military Judge to nonetheless assign an available military judge? Is this the type of "spectacle" that we want to give to the public and to the litigants of the *Code of Service Discipline*?

[169] To ask the question is to answer it. In short, it would be futile here and contrary to the interests of the administration of justice to oblige the assignment of one of the three current military judges.

[170] In passing, as described earlier, this Court was informed by counsel for respondent Dutil during the hearing of this application for judicial review in November 2019 that, on June 21, 2019, Judge Deschênes communicated directly with the military police on the subject of the case. However, a well-informed person examining the issue in detail, in a realistic and practical manner, would conclude that if a judge who is to hear a criminal case communicated with the police before the trial, that alone is a sufficient ground to raise a reasonable apprehension of bias. In addition, even if we were to give relative weight to what is reported in the email dated May 20, 2015—which constitutes hearsay and self-serving evidence—the fact remains that that evidence provides us with rather clear indications about the state of mind and opinion that Judge Deschênes may have had about Colonel Dutil's guilt or innocence, especially after having spoken with Judge Pelletier and independent counsel. That is an important consideration with respect to the appearance of bias, and the least one can say is that Judge Deschênes is in conflict of interest, which is sufficient to personally disqualify her.

[171] Today, we must say it loudly and clearly: the litigants of the *Code of Service Discipline* are not second-class citizens. They all deserve fair treatment and the same quality of justice to which anyone accused of an offence punishable by imprisonment aspires and is entitled. Clearly, it was within the powers of the Deputy Chief Military Judge to protect the accused from flagrant injustice. Moreover, this Court would have acted in the same manner and granted a writ of

prohibition to prevent the continuation of the trial before the Court Martial if the Deputy Chief Military Judge had instead assigned, on June 17, 2019, one of the three eligible military judges after their recusal (*Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at page 394, de Grandpré J. (dissenting); *Valente* at paragraph 15).

[172] In passing, because of the findings at paragraphs 115, 121, 126, 131-133 and 145 of the *Pett* decision, the Deputy Chief Military Judge alternatively submits to this Court that the Director of Military Prosecutions is not able to demonstrate to this Court today that there is a legal duty to assign a military judge to preside over the trial of Colonel Dutil. On the contrary, the *Pett* decision makes it impossible to assign a judge to preside over the trial of Judge Dutil by expressly acknowledging that such a process is contrary to paragraph 11(d) of the Charter. The very assignment of a military judge would give substance to the threat to the independence of the military judgeship rectified by the declaration of no force or effect issued in *Pett*. The Deputy Chief Military Judge submits that *Pett* is unequivocal: it is primarily the Inquiry Committee that must address possible breaches of applicable standards of conduct by military judges (at paragraphs 90-91, 100, 102). In this case, the Inquiry Committee did not relieve Judge Dutil of his duties. Therefore, he cannot be charged under the *Code of Service Discipline* at this stage.

[173] The applicant's counsel forcefully argue that the Court Martial is not a superior court and that the general declaration of no force or effect in the order dated October 2, 2019, is valid only in the case of the court martial of Master Corporal Pett. I agree; this is a serious argument. But that does not remove the problem of independence in this case. It will be for another time. One can expect the accused, Dutil, to raise the fact that, in January 2018, he was still a chief military

judge and that the charges were not validly laid, such that the Court Martial was not validly convened. That is certainly a ground of attack that he could argue before the Court Martial, or even through an application for judicial review seeking a writ of prohibition, coupled with a declaration of no force or effect.

[174] Without deciding today whether or not the Court Martial can issue a general declaration of no force or effect, the fact remains that the Federal Court, the Federal Court of Appeal and the Court Martial Appeal Court undoubtedly have the power to issue declarations of no force or effect (see *Bilodeau-Massé v Canada (Attorney General*), 2017 FC 604; Han-Ru Zhou, "*Erga Omnes or Inter Partes?* The Legal Effects of Federal Courts' Constitutional Judgments", The Canadian Bar Review (2019) Vol. 97 at pages 276-299, particularly at pages 286-290). One need only think of *R v Trépanier*, 2008 CMAC 3, and *R v Leblanc*, 2011 CMAC 2, which led, respectively, to the legislative reforms of 2008 regarding the accused's ability to choose the type of court martial and of 2011 regarding military judges' security of tenure.

[175] The balance of convenience therefore favours retaining the *status quo*. Certainly, the issues of judicial and institutional independence raised in *Pett* and *D'Amico* were not specifically considered by the Deputy Chief Military Judge in the impugned decision. However, they are clearly present today in the context of the Court Martial. On the other hand, it is not up to this Court to determine whether or not Judge Pelletier erred in *Pett*. The same holds true with respect to Judge Sukstorf who has decided to follow the decision rendered by Judge Pelletier. The CMAC will likely be called on to examine the legality of the general declaration of no force or effect as part of the appeal filed by Master Corporal Pett, and if applicable, in the case of an

eventual appeal made by Corporal D'Amico. The fact remains that, at this stage of the case, until a final response is given by the CMAC or another competent tribunal, there is no urgency or reason to undertake multiple proceedings by today obliging the Deputy Chief Military Judge to assign another military judge to preside over the court martial of Colonel Dutil.

[176] In short, for the reasons stated above, in the exercise of its judicial discretion, all of the remedies sought by the applicant are, in any event, disallowed today by this Court in order to ensure the rule of law and to avoid committing a flagrant injustice and to protect the accused from irreparable damage (*Khosa* at paragraph 36; *Strickland v Canada (Attorney General)*, 2015 SCC 37 (CanLII), [2015] 2 SCR 713 at paragraphs 37-39).

XI. **Conclusion: what is the best path for the future?**

[177] We are reaching the end of the current judicial review exercise. The discomfort is palpable. The charge of fraud laid against Colonel Dutil is serious, certainly, but nothing prevents it from being brought before a civilian court. As for the charge of having a personal relationship, a military offence, why was an outside judge not simply assigned?

[178] As the Deputy Chief Military Judge himself raised, there seems to be a legislative gap in the case of conflict of interest at the level of the Office of the Chief Military Judge. However, as we saw earlier, in the case of the prosecutor, the problem was solved easily and quickly by the appointment of a Special Prosecutor, recruited in the reserve force.

[179] In principle, it would always be possible to assign a military judge from the reserve force (see section 165.223 of the NDA). Military judges from the reserve force are former military judges, chairpersons or judge advocates of a Court Martial, or counsel with at least 10 years of practice. If we wish to make an analogy, reserve force military judges are a little bit like deputy judges. They can have other occupations, but they shall not engage in any business or professional activity that is incompatible with the judicial duties that they may be required to perform (section 165.223 of the NDA). They may be assigned as required to preside at a court martial and hold judicial hearings. This constitutes an undeniable asset in the case where military judges from the regular force have a conflict of interest or any other cause of incapacity. The practical difficulty is that the number of former military judges, chairpersons or judge advocates of a Court Martial is necessarily limited. No doubt that is what explains why the reserve force judges panel is still blank after all these years.

[180] In the case of civil courts, legislative provisions will ordinarily provide for the appointment of *ad hoc* judges from outside, whether by the assignment of a judge from another court or a retired judge. Any conflict of interest, real or apparent, is thereby avoided. Any fear of partiality is wiped out at once. Alas, the NDA does not explicitly set out such mechanisms, other than the assignment of a reserve force military judge (section 165.22 of the NDA). And that is what is scandalous.

[181] However, there was a time in the past when superior court judges could preside at Special General Courts Martial (section 155 of the NDA, RSC 1970, c N-4, amended to section 178 of the NDA, RSC 1985, c N-5, then replaced by military judges by the passing of the *Act to amend*

the National Defence Act and to make consequential amendments to other Acts, SC 1998, c 35). However, Special General Courts Martial were repealed by the *Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, SC 2008, c 29. Certainly, it was a question of courts martial limited to cases of *Code of Military Discipline* offenders who were not military members, but the coexistence of the civil courts system was an integral part of the military justice system.

[182] It must be noted that the assignment of an *ad hoc* judge from a superior court would constitute the best alternative in the circumstances. Amending the current act is a promising avenue, at least on its face.

[183] In the absence of legislative action, in the interval, we must not exclude the possibility of contacting a superior court—including this Court or the Court Martial Appeal Court—so that it assigns a judge from its jurisdiction to preside at the trial of Colonel Dutil. Because any superior court has residual inherent jurisdiction to assist the lower courts when required. Thus, in the past the unusual nature of a situation has not prevented superior courts from taking the measures required to contribute to the proper administration of justice, to ensure the maintenance of the rule of law and to prevent flagrant injustices from being committed (*R v Caron*, [2011] 1 SCR 78 at paragraphs 24 *et seq*; *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901; see also Bora Laskin, *The British Tradition in Canadian Law*, cited with approval; *Canada (Human Rights Commission) v Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 SCR 626 at paragraph 29; *MacMillan Bloedel Ltd v Simpson*, 1995 CanLII 57 (SCC), [1995] 4 SCR 725 at paragraphs 29-33; *Trial Lawyers Association of British Columbia v British*

Columbia (Attorney General), 2014 SCC 59 at paragraph 39). Without offering a final answer on this subject, it is another avenue to explore.

[184] To conclude, today we cannot have the accused bear the burden of what seems to be, unfortunately, the result of an absence of legislative or governmental lucidity. Public trust in the military justice system must be preserved. It is a key factor that we cannot appear to ignore when there is a risk of conflict of interest, apparent or real, which could shake the public trust in the administration of military justice. Justice is not a pandora's box that can be opened as desired to see what is hiding in it, nor a game of chance where the accused must play Russian roulette with the prosecution. We are speaking of the career, the reputation, the freedom and the life in the future of an individual. There must exist a reasonable degree of probability that Colonel Dutil can benefit, in fact and in appearance, from a fair and equitable trial before the Court Martial. It is clearly not the case today. It is now up to the applicant and the military authorities concerned, including the Judge Advocate General, the defence staff and the Minister, to take note of these reasons, and, where applicable, to do what must be done in the circumstances.

[185] This application for judicial review is dismissed without costs.

JUDGMENT in T-1151-19

THE COURT ORDERS that this application for judicial review is dismissed without costs.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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