Federal Court  Cour fédérale

**Date: 20201214**

**Docket: T-1301-20**

**Citation: 2020 FC 1154**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, December 14, 2020**

**PRESENT: The Honourable Mr. Justice Roy**

**BETWEEN:**

**SERGEANT A.J.R. THIBAULT**

**Moving Party**

**and**

**THE DIRECTOR OF MILITARY PROSECUTIONS**

**Respondent**

## JUDGMENT AND REASONS

[1] The Court is seized of a motion for an interim writ of prohibition under section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 [the Act], and an expedited hearing of the case. An application for a writ of prohibition under sections 18 and 18.1 of the Act is outstanding. The respondents (who were initially Military Judge Deschênes, the Deputy Chief Military Judge and the Director of Military Prosecutions) presented in a single document a multi-pronged motion to

(1) strike the notice of application and (2) have some of the respondents be removed, and (3) a reply to the moving party's motion for an interim writ of prohibition and an expedited hearing of the case. All this was the source of some confusion.

## I. A tangle of procedural devices

[2] The motion for an interim writ of prohibition, dated November 13, 2020, follows an application for a writ of prohibition against the respondents, this application being dated October 30, 2020. Military Judge C.J. Deschênes has already found Sergeant Thibault guilty and is set to continue the trial, which has reached the sentencing stage. While the applicant (who is also the moving party) wishes to prohibit the Military Judge from hearing his motion for a mistrial by way of a writ of prohibition alleging a reasonable apprehension of bias, he is also seeking to prevent her from hearing his motion for recusal, this time by way of what he refers to as an interim writ of prohibition.

[3] It seems helpful to briefly outline the highlights of this case:

- February 18, 2020: Judge Deschênes finds Sergeant Thibault guilty of the offence with which he was charged. The alleged facts date back to August 20, 2011. In the meantime, Sergeant Thibault is one of the appellants in two cases heard by the Supreme Court of Canada (*R v Cawthorne*, 2016 SCC 32, [2016] 1 SCR 983; *R v Stillman*, 2019 SCC 40), both dealing with aspects of the military justice system.

- July 8, 2020: An application for a stay of proceedings is filed with the Standing Court Martial because of an allegation that the service tribunal is not independent

and impartial, in violation of paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11) [the Charter].

- September 18, 2020: Conference call between the parties' counsel and the Military Judge. As Sergeant Thibault's counsel has to withdraw because of illness, his new lawyers are asked to indicate their intentions with regard to the July 8 motion. Not only do they intend to maintain the July 8 motion, they also argue that Military Judge Deschênes might have to recuse herself because of the possible role she played in the preparation of an order issued by the Chief of the Defence Staff on October 2, 2019, and according to which the Deputy Vice Chief of the Defence Staff was appointed to "exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge". This order is being relied on to claim that the service tribunal is violating the constitutional guarantee offered by paragraph 11(d) of the Charter. During the conference call, the Military Judge indicates that she intends to recuse herself (transcript of the conference call, Exhibit F to the affidavit of Phyllis Nadeau, p 17 of 20).

- September 30, 2020: A motion for a mistrial is filed, replacing the motion of July 8, 2020. The first paragraph of the motion mentions the pending recusal of the trial judge. The motion relies on six decisions rendered by three different military judges who considered the argument that the order of October 2, 2019, undermines the judicial independence required under paragraph 11(d) of the Charter.

- September 30, 2020: On the same day the motion for a mistrial is filed, another conference call takes place with the Military Judge, attended by the same lawyers. To begin with, the Military Judge announces that [TRANSLATION] "after careful consideration, [she has] decided to hear the parties as to why [she] should or should not recuse [herself], if this is still the position of the defence" (transcript of the conference call, Exhibit H to the affidavit of Phyllis Nadeau, p 2 of 25). Upon discussion, it is agreed that a motion for recusal will be filed, with the Military Judge, however, describing it as a [TRANSLATION] "preliminary motion on [the moving party's] motion for recusal". A [TRANSLATION] "preliminary hearing on the motion for recusal" is set for October 9.

- October 7, 2020: A motion for a preliminary hearing is filed.

- October 9, 2020: Preliminary hearing on the motion for recusal. Sergeant Thibault essentially alleges that the service tribunal does not have the required institutional independence because of the October 2, 2019, order and that Military Judge Deschênes should recuse herself from disposing of this motion because of the possible role that she allegedly played in the creation of the order of October 2, 2019, or its predecessor dated February 19, 2018, in her capacity as a legal advisor specifically assigned to the Chief of the Defence Staff. A timetable for the next steps is established, even as Sergeant Thibault announces his intention to turn to the Federal Court:

  (a) Motion for recusal no later than December 1, 2020;

  (b) Reply from the prosecution within five [TRANSLATION] "business" days;

(c) Hearing of the recusal motion on December 21, 2020;

(d) Motion for mistrial because the Court Martial is not an independent and impartial court within the meaning of paragraph 11(d) of the Charter, to be heard on February 1, 2021; and

(e) Trial to continue on March 8, 2021.

- October 30, 2020: Notice of application for a writ of prohibition.

- November 13, 2020: Notice of an amended motion for an interim writ of prohibition and an expedited hearing; motion to be heard on December 7, 2020.

- November 20, 2020: Respondents' motion to strike the notice of application and to be removed as a party, and reply to the applicant's motion for an interim writ of prohibition and an expedited hearing of the case.

- November 27, 2020: Reply from the applicant/moving party to the motion to strike of November 20, 2020.

- December 7, 2020: Hearing of the motion for an interim writ of prohibition and the motion to strike.

[4] In the end, what must be determined is which issues need to be decided now. Should the Court intervene now, when recusal has not yet been decided on? In other words, what about the interim relief sought by the applicant/moving party? If the Military Judge does not recuse herself

on December 21, how should the motion to strike and the application for judicial review under sections 18 and 18.1 of the *Federal Courts Act* be dealt with?

## II. State of affairs

[5] The hearing of the recusal motion before Military Judge Deschênes is currently scheduled for December 21, 2020. If Judge Deschênes were to conclude that she should not recuse herself, a motion for what is known as a "mistrial" would follow and be heard by Military Judge Deschênes so that she can determine whether the service tribunal constituted to dispose of the charge against Sergeant Thibault is constitutionally infirm. This motion is scheduled for February 1, 2021. An application for a writ of prohibition to prevent Military Judge Deschênes from hearing this motion is outstanding. It is this motion that the Director of Military Prosecutions is arguing should be struck out. It is conceivable that if Military Judge Deschênes recuses herself on or around December 21, 2020, the motion for a mistrial would be heard by another judge on that date anyway.

[6] Before the Federal Court is an application for a writ of prohibition under sections 18 and 18.1 of the Act to prevent Military Judge Deschênes from continuing to hear Sergeant Thibault's case, including the motion for a mistrial. In the same notice of application, Sergeant Thibault is seeking a writ of mandamus directing the Deputy Chief Military Judge to assign a judge to replace Judge Deschênes. Aside from the fact that this second order is probably contrary to section 302 of the *Federal Courts Rules*, SOR/98-106 [the Rules], it is highly likely unnecessary since it is doubtful that the Chief Military Judge would put off appointing a replacement if Military Judge Deschênes were to recuse herself. The Deputy Chief Military Judge has not

refused to appoint a replacement for a judge who is yet to recuse herself. The writ of mandamus seems superfluous.

[7] The notice of application under sections 18 and 18.1 of the Act is dated October 30. The motion of November 13, 2020, was made pursuant to section 18.2 of the Act. It was filed as a motion for an interim writ of prohibition. But it is in fact a motion for interim relief before a final decision is made on the writ of prohibition. If I understand correctly, the purpose of the interim relief is simply to prevent Military Judge Deschênes from ruling on the sought-after recusal.

[8] The respondents' case to strike also has several aspects, as mentioned above. The respondents question the naming of some of the respondents who, they submit, should be removed as parties. I will come back to that later. The respondents claim that the motion for an interim writ of prohibition should be dismissed. They also argue that the application for judicial review (writ of prohibition) should be struck out.

[9] After hearing the parties, I find that the Court should hear this case in stages. Before me at this stage is a motion by Sergeant Thibault to prevent Military Judge Deschênes from deciding on whether she should recuse herself, which Sergeant Thibault has asked her to do. What matters first is to decide on the motion for an interim writ of prohibition made by Sergeant Thibault.

[10] Sergeant Thibault replied to part of the respondents' multi-pronged motion. His factum of November 27, 2020, presented as his written representations in reply to the motion to strike,

largely deals with the motion for recusal that he does not wish Military Judge Deschênes to hear on December 21, 2020.

[11] The part of the respondents' motion to strike that deals with the notice of application under sections 18 and 18.1 of the Act is based on the contention that this Court should not [TRANSLATION] "interfere with the role of the court martial as fact-finder and merits-decider by becoming a parallel avenue of appeal" (heading between paras 39 and 40, respondents' written representations). Nowhere did I find Sergeant Thibault's argument on this specific topic in his November 27 factum. In any event, at this stage, I have to dispose of the motion for an interim order to prevent the Military Judge from determining whether she should recuse herself.

[12] Before that, however, I will say a few words on how motions can encumber the judicial process. Indeed, motions to strike judicial reviews are not encouraged (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 [*David Bull Laboratories*], at pp 597 to 600). Although they are not prohibited, the discretion derived from the Court's ability to restrict the misuse or abuse of court procedures requires that only obvious cases of radical defect qualify. It is known since *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, that the test for legal actions is that it must be plain and obvious that the action is certain to fail because it contains a radical defect. In *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, [2014] 2 FCR 557, the Federal Court of Appeal determined with respect to a motion to strike an application for judicial review, that "[t]here must be a 'show stopper' or a 'knockout punch' – an obvious, fatal flaw striking at the root of this Court's power to entertain the application" (para 47). This view seems to be in line with the comments of the Court of Appeal in *David Bull*

*Laboratories*, which held that notices of application should be challenged at the hearing of the application for judicial review itself*:*

> The basic explanation for the lack of a provision in the *Federal Court Rules* for striking out notices of motion can be found in the differences between actions and other proceedings. An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with *viva voce* evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action. Even though it is important both to the parties and the Court that futile claims or defences not be carried forward to trial, it is still the rare case where a judge is prepared to strike out a pleading under Rule 419. Further, the process of striking out is much more feasible in the case of actions because there are numerous rules which require precise pleadings as to the nature of the claim or the defence and the facts upon which it is based. There are no comparable rules with respect to notices of motion. Both Rule 319(1) [as am. by SOR/88-221, s. 4], the general provision with respect to applications to the Court, and Rule 1602(2) [as enacted by SOR/92-43, s. 19], the relevant rule in the present case which involves an application for judicial review, merely require that the notice of motion identify "the precise relief" being sought, and "the grounds intended to be argued." The lack of requirements for precise allegations of fact in notices of motion would make it far more risky for a court to strike such documents. Further, the disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike. This motion to strike has involved a hearing before a trial judge and over one half day before the Court of Appeal, the latter involving the filing of several hundred pages of material, all to no avail. The originating notice of motion itself can and will be dealt with definitively on its merits at a hearing

> before a judge of the Trial Division now fixed for January 17, 1995.
>
> (pp 596–597)
> [Emphasis added.]

I doubt that it would be in the interest of the administration of justice in the matter at bar to hear independently from the application for judicial review a motion to strike that application for judicial review, seeking in this case a writ of prohibition. In accordance with *David Bull Laboratories*, it is best that the challenge of the notice of application, for the reasons given by the respondents, take place if and when the application for a writ of prohibition is heard. The confusion encountered during case management strongly suggests that this is the best way to proceed: the grounds raised to argue that an action in prohibition is inappropriate should be argued at the same time as the motion for a writ of prohibition, should this hearing become necessary if the Military Judge does not recuse herself.

[13] It would be premature in any event to seek to dispose of the motion to strike the application for judicial review by way of a writ of prohibition or mandamus when the applicant's reply to the motion appears to relate only to the interim writ of prohibition. It would be better therefore to hear the full argument at the judicial review hearing. What is more, the application for judicial review (under sections 18 and 18.1) of October 30, 2020, will become moot if the motion for recusal is granted on or around December 21, 2020.

[14] If the motion for recusal is denied, the Military Judge will have chosen to hear the motion scheduled for February 1, 2021 (the service tribunal does not have the independence required to satisfy paragraph 11(d) of the Charter). This could justify the application for a writ of prohibition

being heard if the applicant maintains his October 30 notice of application. At this hearing, the respondents will be able to argue their contention that this Court should either refuse to hear the application or order relief. I note that such a hearing will have to take place before the trial of Sergeant Thibault can continue.

[15] Unfortunately, on the face of the various documents presented to date, it is not clear if the applicant has responded to the motion to strike according to which the Court should not interfere with the military justice system. In my opinion, the thicket of procedural devices and documents have made it difficult to understand all the issues. A more systematic examination seems necessary. This must begin with a review of the motion to prevent the Military Judge from ruling on the sought-after recusal.

## III. Recusal arguments and discussion

[16] This decision will therefore only deal with the applicant's motion for Military Judge Deschênes's recusal. At issue is whether the Military Judge may hear the motion for recusal formally filed on December 1 and scheduled to be heard on December 21. The moving party writes in his memorandum of fact and law of November 13 that [TRANSLATION] "granting an interim writ of prohibition before December 21, 2020, is fair and just as it would avoid 'an appearance of bias' on the part of the military judge in the hearing of the motion for recusal on December 21, 2020, as well as Motion 11(d) to set aside the conviction that she herself imposed on Sergeant Thibault" (para 14). [TRANSLATION] "Motion 11(d)" is scheduled to be heard on February 1. The respondents have replied that the motion for recusal must be filed and decided

on. The applicant does not meet any of the requirements for an interim order that, in any event, it is premature to issue.

[17] In his memorandum of November 13, the moving party seeks to establish that he meets the requirements for interim relief. He alleges that there is a serious underlying question, that he would suffer irreparable harm if the interim writ of prohibition were not issued, and that the balance of convenience lies in his favour. He thereby suggests that the Court must intervene to prevent the Military Judge from hearing the motion for recusal even though it was he who filed it.

[18] On November 27, 2020, Sergeant Thibault filed a reply record [TRANSLATION] "to the record of the motion to strike the notice of application and remove as a party, and a reply to the applicant's motion for an interim writ of prohibition and an expedited hearing of the case" of November 20, in which he attacks what he describes as a [TRANSLATION] "flagrant" appearance of bias on the part of the Military Judge. As noted earlier, nowhere does this document respond to the central argument made by the respondents in their motion to strike that the Federal Court should not interfere in the criminal procedure of the Court Martial, and even less so at a so-called interlocutory stage. This is also confusing.

[19] In this same document of November 20, 2020, the respondents deal directly with the motion to issue an interim writ of prohibition, arguing that none of the three prongs of the applicable test have been met.

[20] The argument with respect to Military Judge Deschênes's recusing herself seems to me to boil down to the claim that her bias regarding her recusal is so [TRANSLATION] "flagrant" that the other prongs of the test do not have to be satisfied. The word "flagrant" is used no less than 22 times in the moving party's November 27 memorandum in reply to the motion to strike the application for a writ of prohibition, but also in reply to Sergeant Thibault's motion for an interim writ of prohibition (paras 68 et seq. of the respondents' written representations of November 20, 2020).

[21] Sergeant Thibault must be able to satisfy all three prongs of the test in order to obtain the interim relief he is seeking. Whether the apprehension of bias is flagrant or not, he still has to satisfy the irreparable harm and balance of convenience prongs.

A. *Applicant's/moving party's argument*

[22] The moving party's statements are largely based on the September 18 telephone conversation in which the Military Judge said she intended to recuse herself. Twelve days later, she requested a formal motion for recusal. A preliminary hearing on the motion to strike was held on October 9, at which a timetable fixing the recusal motion hearing for December 21 was established.

[23] An allegation of a reasonable apprehension of bias is most serious (*Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 [*Wewaykum*], at para 3). However, apart from the September 18 statement of intent, the only other concrete evidence submitted by the moving party is a portion of the transcript of a case described as involving Major Jacques. Below is the

passage where the Deputy Chief Military Judge explains why Military Judge Deschênes had asked to recuse herself from the trial. The transcript is of a hearing held on November 2:

> [TRANSLATION]
>
> THE COURT: Just to make clear.
>
> Yes. So the question [. . .] Yeah, let me just get my notes. I am now the judge assigned to preside over the court martial of Major Jacques [. . .] Give me a second. I'm just going to [. . .] I'm just going to clarify something. No, that doesn't work. Wait, I'll find it. Okay. I simply wanted to tell you that Judge Deschênes sent me an email following receipt of the motions that were presented, the motion for a change of venue.
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> But in one of the three motions, she considered problematic among other things the fact [. . .] Wait, I'm just going to reread what I have here, [TRANSLATION] "did the administrator" [. . .] consider the facts raised in the motion, particularly the one relating to section 11(d), and the fact, among other things, that it mentioned the order of the Chief of the Defence Staff of June 14 and also of October 2, 2019, these orders being orders that amended previous orders that were issued by the Chief of the Defence Staff. And at the time those earlier orders were issued, she was working [. . .] she was a legal advisor in the office of the Chief of the Defense Staff.
>
> It therefore seems justified to her that there is a risk that a reasonable and properly informed person who is aware of all the relevant circumstances and who is viewing the matter realistically and practically might conclude that she appears to be biased. And given those circumstances she has asked me to appoint another judge.
>
> Considering the circumstances, and since her request seems reasonable to me, I have decided to cancel her assignment and to appoint another judge. And that judge happens to be me.

[24] According to the Deputy Chief Military Judge, Military Judge Deschênes *asked* to be relieved of this assignment. It is difficult to see what is flagrant about Military Judge Deschênes's hearing a motion seeking her recusal when she previously recused herself in another

case. This is worth remembering. The question that arises now is whether the presiding judge should be the one to decide over her own recusal. It could certainly well be argued that not hearing another trial is relevant to the outstanding recusal motion. But it does not favour a ruling that the Military Judge should not dispose of the motion.

[25] The third point raised by the moving party is quite speculative at this stage. He argues that the role played by the Military Judge before her judicial appointment, as legal advisor to the Chief of the Defence Staff, could mean that she was involved in the October 2, 2019, order that is at the root of the argument that the Court Martial does not have the required constitutional independence. At this time, no one knows whether Military Judge Deschênes played a role, let alone what that role was.

[26] According to Sergeant Thibault, flagrant bias, or an appearance of flagrant bias, is sufficient to support what he calls an interim prohibition, which would prevent a recusal hearing. He concludes in his November 27 factum that [TRANSLATION] "given the flagrant appearance of bias on the part of Military Judge Deschênes, Sergeant Thibault asks this Court to issue a writ of prohibition to prevent her from hearing the recusal motion on December 21, 2020, and from continuing to preside over his court martial" (para 39). The moving party names only one authority in support of his argument, *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330 [*Dutil*], a decision by my colleague Justice Luc Martineau. The moving party refers to several paragraphs of the decision (paras 167 to 176) in which this Court allegedly establishes that in the context of the trial of the then Military Chief

Justice it was flagrant that the Deputy Chief Military Judge and the other three military judges could not hear the case of Colonel Dutil.

[27] In a motion for a writ of mandamus, the Director of Military Prosecutions argued that the Deputy Chief Military Judge should have asked the other three military judges if they were available to preside over the trial of Chief Justice Dutil. Paragraphs 167, 171 and 176 seem to have captured the essence of this Court's comments:

> [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.
>
> [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).
>
> [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).

B. *Respondents' argument*

[28] Counsel for the respondents is not wrong to point out that in *Dutil* the Court was not talking about a reasonable apprehension of flagrant bias. What the Court was talking about was a flagrant injustice in the circumstances of that case. Thus, the moving party's assertion that the Director of Military Prosecutions [TRANSLATION] "did not consider that in the event of a reasonable apprehension of flagrant bias, this Court has to prevent a military judge from hearing a recusal motion against her. This point of law established by this Court in *Dutil*" (factum of November 27, 2020, at para 12) does not represent what the decision said. The *Dutil* decision does not establish what Sergeant Thibault is trying to read into it.

C. *Discussion*

[29] In *Dutil*, and as set out in this Court's judgment, the four military judges had reasons for not being able to preside over the trial, be it a deep personal friendship; insufficient ability to hear the case in French (the language chosen by Colonel Dutil for his trial); a well-known hostility towards Colonel Dutil, and, finally, the fact that the Military Judge had collaborated in the military police investigation even though she was a judge. This led the Court to determine that it would have granted a writ of prohibition if the Deputy Chief Military Judge had assigned one of the three eligible military judges after he recused himself (para 171).

[30] Sergeant Thibault's counsel repeatedly stated at the hearing that if his position on the apprehension of flagrant bias did not hold water, his argument would fail. Indeed, he claims that the [TRANSLATION] "applicable law is not the same when the reasonable apprehension of bias is flagrant" (factum of November 27 at para 13). But he provides only one authority: *Dutil*. That is of no assistance to the moving party.

[31] To begin with, *Dutil* does not talk about a reasonable apprehension of flagrant bias. At issue is the flagrant injustice in circumstances that are very specific to the case. The nature of the apprehension of bias is not mentioned. The syllogism proposed by the moving party is not supported by *Dutil*. Furthermore, if a parallel between the facts in *Dutil* and the facts in the matter at bar were to be considered, they would have to be equivalent. But the apprehension of bias in *Dutil* is simply of a different order. We are merely at the stage where the Military Judge has to review the circumstances that might satisfy the *Wewaykum* test. For that, she will have to consider her September 18 statement, her decision not to preside over the trial of Major Jacques and her possible involvement in the October 2, 2019, order. If the facts of this case were equivalent to *Dutil*, the Court might be required to intervene to prevent the Military Judge from considering recusing herself. However, this is far from true here. Moreover, while *Dutil* concerns a mandamus to force a judge to be assigned, the matter at bar relates to a recusal that Sergeant Thibault himself is seeking, but which claims that the motion for recusal should not even have to be filed.

[32] Our situation is not related to the one in *Dutil*. Sergeant Thibault wants to prevent the Military Judge from ruling on her own recusal, one that he is seeking. As I stated earlier, the fact

that the same Military Judge chose not to hear the case of Major Jacques does not weigh in favour of a judicial decision to prevent her from hearing a motion to recuse herself. Rather, the opposite is true in that this seems far from the closed mindset that is characteristic of bias. As for the role played by the Military Judge with respect to the Chief of the Defence Staff, nothing is known about it. Presumably, it is something the Military Judge would consider within the context of a motion for recusal. But it is not something that can carry any weight with the reviewing court without that court having a sense of the parameters.

D. *Application of the three-pronged test*

[33] The respondents in this case argue that the requirements for obtaining an interim order to prevent Military Judge Deschênes from hearing and disposing of the recusal motion have not been met. These requirements are well known (*RJR -- MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR -- Macdonald*]):

(a) Is there an issue underlying the application for interim relief that is in the nature of a serious question? (In some circumstances, a strong *prima facie* case has to be demonstrated (*RJR-Macdonald*, supra at para 51; *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311; *R v Canadian Broadcasting Corp*, 2018 SSC 5, [2018] 1 SCR 196).)

(b) Will the applicant suffer irreparable harm if the interim relief is not granted?

(c) In favour of which party does the balance of convenience lie?

[34] Before the Federal Court, all three questions must be answered in the affirmative if interim relief is to be granted (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112, at paras 13 to 21, *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 [*Oshkosh Defense Canada Inc.*], at para 21).

[35] Here, the respondents argue that none of the questions can be answered in the affirmative. There is no serious question because there is no "strong *prima facie* case". The reviewing court should not interfere given that the Court Martial Appeal Court may eventually dispose of the matter. Moreover, it is only normal to hold a hearing when a party seeks recusal. Regarding irreparable harm, there needs to be clear and compelling evidence that there will be harm if the interim prohibition is denied. Nothing of the sort has been proven here. The balance of convenience also lies in favour of the respondents. Considering an application of this type is detrimental to the administration of justice and a waste of judicial resources.

[36] In contrast, the applicant/moving party argues that if he has to satisfy all three prongs, he has succeeded. He claims that he focused on the serious question in his memorandum of fact and law of November 13 and described this question as the apprehension of flagrant bias on November 27. In going back over the facts again, which he claims to be sufficient to prevent the Military Judge from considering the sought-after recusal, the applicant/moving party subsumes the conditions for recusal under the conditions required to prevent a judge from dealing with such a matter. He states that irreparable harm is caused simply by having to seek recusal. At the risk of unduly repeating myself, through his interim order, the applicant/moving party is seeking to prevent the Military Judge from hearing his motion for recusal and not from determining

whether recusal is justified. Irreparable harm would be caused if she were to rule on what is at issue. The allegations in his motion relating to his freedom—at stake were the trial to continue—are irrelevant at this stage. He pursues the same theme with regard to the balance of convenience, arguing that his freedom would be jeopardized should the trial continue despite his argument that the service tribunal is not independent.

[37] In my opinion, the motion for an interim writ of prohibition to prevent Military Judge Deschênes from hearing a recusal motion from Sergeant Thibault should be dismissed. The requirements for obtaining this relief have not been satisfied. In addition, as noted above, not only does the doctrine of reasonable apprehension of flagrant bias, on which the moving party is relying, not arise in the only authority that he cites, but he would have had to demonstrate it to prevent the judge from even hearing the motion for recusal.

[38] The respondents are correct in stating that irreparable harm has not been demonstrated and that the balance of convenience lies in their favour. It is hard to see where the harm is and how it would be irreparable if the Military Judge did dispose of the recusal motion. Nor has it been established that the balance of convenience lies in favour of Sergeant Thibault.

[39] A decision is needed because both parties rely on it. In *Rushnell v Canada (Attorney General)*, [2001] FCJ No. 366, [2001] FCT 199 [*Rushnell*], recusal was also at issue. As stated earlier, the military judge assigned to hear the case had ruled on recusal and had concluded that there was no reason for him to recuse himself. But he did adjudicate. The military judge had adjourned to allow Private Rushnell to apply for interim relief. The purpose of the sought-after

interim prohibition was to prevent the Court Martial from proceeding pending the decision on the writ of prohibition. This Court had to decide whether the test for irreparable harm had been met:

> **21** If the stay is denied, the Standing Courts Martial will proceed with the trials. If the applicants are convicted, they can appeal their conviction to the Court Martial Appeal Court and raise, as one of their arguments, their objection to the constitution of the Standing Court Martial. If sentenced to a term of imprisonment, they can be released pending disposition of the appeal. If sentenced to pay a fine, terms for payment can be obtained. If not convicted, the issue becomes academic. Not granting the stay has the effect, in the end, of forcing the applicants to go to trial and of postponing the determination on the question of reasonable apprehension of bias. The harm caused by this is not irreparable.

[40] In the matter at bar, we are at a preliminary stage, at the beginning, in that the Military Judge has not even ruled on her recusal. The harm to be established relates to the possibility of the Military Judge hearing the motion for her recusal. No harm will be established if she is allowed to make her decision. Indeed, even the moving party seems to agree with this since he states in paragraph 13 of his November 27 factum that [TRANSLATION] "in principle, the [Director of Military Prosecutions] is right in saying that it is up to the judge in question to rule on the recusal motion". If the Military Judge recuses herself, the other proceedings brought by Sergeant Thibault will become moot and risk expiry (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). In *Oshkosh Defense Canada Inc*, above, the Federal Court of Appeal, having noted that proving irreparable harm is often the toughest obstacle for a party seeking a stay (or interim relief), provided the following summary of the state of the case law on what is required:

> [24] Further, irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation: *Janssen Inc.*, above at para. 24. Without explanation, a failure to ask the administrative decision-maker to delay the effect of its decision might be taken to be the failure to avail oneself of an opportunity to avoid the harm stemming from an adverse decision.

> [25] Finally, to prove irreparable harm, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm—not hypothetical and speculative harm—that cannot be repaired later: *Stoney First Nation v. Shotclose*, 2011 FCA 232, 422 N.R. 191 at paras. 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84, 402 N.R. 341 at paras. 14-22; *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, 445 N.R. 360 at paras. 14-16; *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255, 440 N.R. 232 at para. 31; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at para. 12; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 176 at paras. 44-46. Those who offer assertions rather than evidentiary demonstrations and "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence" often fall short on this branch of the stay test: *Glooscap* at para. 31; *Stoney First Nation* at para. 48. Those who offer "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" often succeed: *Glooscap* at para. 31; see also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd*., 2010 FCA 232, 406 N.R. 304 at para. 14 and *Laperrière* at para. 17.
>
> [Emphasis added.]

Here, there has been no such demonstration.

[41] This in itself is enough to reject the motion for interim relief to prevent the Military Judge from hearing the motion to recuse herself. But in addition, there is no doubt that at this stage the balance of convenience lies in favour of allowing an opportunity to rule on the recusal. The respondents rely on *Rushnell* (above at para 22), where the Court accepted the argument that stays would multiply: "The potential for a cascade of stays and the near-paralysis of the military justice system is impractical and not in the public interest." Such procedural devices merely encumber the process and wastes already thinly stretched judicial resources. In the matter at bar, the motion for interim relief is premature: it is up to the Military Judge to carefully consider the

sought-after recusal. Indeed, nothing in this decision should be seen to suggest that the motion to recuse should not be allowed. That is not in issue.

[42] The respondents also refer to paragraphs 22 and 23 of *Forsyth v Canada (Attorney General)*, 2002 FCT 643, [2003] 1 FC 96, to avoid the issue of wasting judicial resources. In my view, the motion for interim relief only complicates the military justice system unjustifiably by seeking to bypass the primary decision-maker with respect to recusal, the Military Judge.

[43] It is worth recalling that the Military Judge must approach the matter with an open mind (*Wewaykum*, above at para 58). The Military Judge gave no indication that she would not do so. Nothing suggests that she does not have an open mind on her recusing herself. Indeed, impartiality is strongly presumed. As stated at paragraph 59 of *Wewaykum*:

> Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

There is nothing incongruous in this presumption being valid even in cases where recusal is sought. At issue is whether there is a reasonable apprehension of bias as viewed by a properly informed observer, and not whether there is actual bias. The "test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through

— conclude?' Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369, p. 394, as cited in *Wewaykum*, above at para 60). This is perhaps one of the situations where impartiality is put forward most thoroughly.

[44] In this case, the Military Judge benefits from this presumption of impartiality, which allows her to consider all the circumstances, including the intention she expressed on September 18 to recuse herself and her decision not to hear the Jacques case, in order to determine whether it would raise a reasonable apprehension of bias in an informed person who has thought the matter through, thus supporting her recusal. She is also familiar with the role she played in relation to the October 2, 2019, order. Counsel for Sergeant Thibault and for the Director of Military Prosecutions will be allowed to make representations.

[45] It follows that the motion for an interim writ of prohibition must be dismissed.

## IV. Removal as party

[46] The respondents have argued that Military Judge Deschênes and the Deputy Chief Military Judge should not be in the style of cause because they have been improperly named under paragraph 303(1)(a) of the *Federal Courts Rules*. The moving party does not dispute this; he merely submits that the military judges were named in *Rushnell*. He claims to trust in the [TRANSLATION] "Court's wisdom". In these circumstances, Military Judge C.J. Deschênes and the Deputy Chief Military Judge shall be removed as respondents, their presence not being necessary to ensure that all matters in dispute in the proceeding may be completely determined

(rule 104 of the *Federal Courts Rules*). Only the Director of Military Prosecutions shall remain as respondent. The style of cause is amended accordingly.

## V. Conclusion

[47] There might obviously still be issues to resolve if the motion for the Military Judge to recuse herself is dismissed. She would have to deal with the motion for a mistrial, according to which the service tribunal is not independent and impartial within the meaning of paragraph 11(d) of the Charter (September 30, 2020, motion for a mistrial to be heard on February 1, 2020). But there is an outstanding notice of application under sections 18 and 18.1 of the *Federal Courts Act* for a writ of prohibition to prevent Military Judge Deschênes from hearing that motion. That motion argues, among other things, that the Military Judge was involved in the creation of the October 2, 2019, order, which underlies decisions of military judges pursuant to paragraph 11(d) of the Charter.

[48] In his multi-pronged motion, the Director of Military Prosecutions requested on November 20 that the notice of application be struck out (in addition to requesting that two of the respondents be removed and that the interim writ of prohibition of November 13, 2020, which is the subject of this decision, be dismissed). This motion to strike is also outstanding. In my opinion, and in line with the teachings of *David Bull Laboratories,* the argument made in the motion to strike can just as well be presented at the hearing of the application for a writ of prohibition if that hearing takes place. I have already noted that the applicant does not yet appear to have responded to the respondent’s main argument that a reviewing court should not interfere in the military justice process. At the same time, it will be necessary to dispose of the motion for

a writ of mandamus to force the Deputy Chief Military Judge to assign a Military Judge to replace Military Judge Deschênes should she be prevented from continuing to hear the trial of Sergeant Thibault. The applicant/moving party has already indicated that he trusts in the Court's "wisdom" with respect to the issuance of a writ of mandamus.

[49] The next steps in this rather tangled affair primarily depend on a decision on the recusal motion. The motion for a writ of prohibition, regarding the hearing of the motion for a mistrial, is the subject of an application for an expedited hearing. The respondent is also in favour of this. The Court therefore invites the parties, as applicable, to suggest a reasonable timetable for the next steps, to be considered by the Court.

**JUDGMENT in T-1301-20**

**THIS COURT ORDERS that:**

1. Military Judge Deschênes and the Deputy Chief Military Judge, named as respondents in the proceedings until this day, are removed as respondents. The style of cause will henceforth be the one appearing on the cover page of this judgment and its reasons.

2. The motion for an interim writ of prohibition to prevent Military Judge Deschênes from hearing a recusal motion from Sergeant Thibault is dismissed. There will be no award as to costs.

3. The parties are invited to submit to the Court, if applicable, their timetable for the next steps in the proceeding to expedite the hearing of the application for judicial review under sections 18 and 18.1 of the *Federal Courts Act*, during which the actual challenge of the notice of application by way of a motion to strike will be heard.

"Yvan Roy"
Judge

Certified true translation
Johanna Kratz

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1301-20 |
| **STYLE OF CAUSE:** | SERGEANT A.J.R. THIBAULT v THE DIRECTOR OF MILITARY PROSECUTIONS |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO, AND GATINEAU, QUEBEC |
| **DATE OF HEARING:** | DECEMBER 7, 2020 |
| **JUDGMENT AND REASONS:** | ROY J. |
| **DATED:** | DECEMBER 14, 2020 |

**APPEARANCES:**

| | |
|---|---|
| Commander Mark Létourneau<br>Col Jean-Bruno Cloutier | FOR THE APPLICANT |
| Pavol Janura<br>Marilou Bordeleau | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |