Federal Court Cour fédérale

Date: 20240108

Docket: T-2010-23

Citation: 2024 FC 26

[ENGLISH TRANSLATION]

Montreal, Quebec, January 8, 2024

Present: The Honourable Mr. Justice Gascon

BETWEEN:

MAJOR V.M.S. JACQUES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] This is a motion for an interim writ of prohibition under section 18.2 of the *Federal Courts Act*, RSC 1985, c. F-7 [FC Act] and an expedited hearing of the case. The motion is brought by the applicant, Major Véronique Jacques, apart from her military court trial, which is scheduled to begin on April 15, 2024.

[2] This motion is part of an application for judicial review [AJR] filed by Major Jacques before this Court on September 22, 2023. In her AJR, Major Jacques contests an interlocutory decision dated September 13, 2023 [Decision] whereby the Deputy Chief Military Judge, Lieutenant-Colonel Louis-Vincent d'Auteuil, assigned to preside over Major Jacques' General Court Martial, denied her objection to his presiding.

[3] I note that in this motion, the Court does not have to decide the substance of the charges facing Major Jacques before the military court, or the merits of her challenge of Military Judge d'Auteuil's refusal to recuse himself. Rather, the Court's role is limited to checking whether Major Jacques meets the requirements for issuing the interim writ of prohibition she wishes to obtain.

[4] For the following reasons, Major Jacques' motion will be dismissed. After reviewing the parties' submissions, the evidence, and the particular circumstances surrounding the motion, I am not satisfied that the facts justify the Court exercising its discretion to order the interim prohibition sought by Major Jacques. Instead, I agree with the respondent, the Attorney General of Canada [AGC], and conclude that Major Jacques does not meet any of the three prongs of the well-established test for granting the requested interim relief. In particular, the AJR filed by Major Jacques is premature, as it relates to an interlocutory decision of Military Judge d'Auteuil, and there are no exceptional circumstances that would justify departing from the principle that Major Jacques must first, before applying to this Court, exhaust the remedies available to her in the proceedings underway before the military court. For this reason, her AJR does not raise any serious issues to be tried. Furthermore, and considering the appropriate and effective remedies available to her before the military court, Major Jacques has not established that denying the

interim prohibition sought would cause irreparable harm to her or that the balance of convenience weighs in her favour.

II. Factual background

[5] In 2019, Major Jacques was charged with committing service offences and infractions contrary to various provisions of the *National Defence Act*, RSC 1985, c N-5 [NDA]. Major Jacques faces six charges, including various offences for committing fraudulent acts, wilfully making a false statement in an official document, and engaging in conduct to the prejudice of good order and military discipline.

[6] Major Jacques' trial was scheduled before a so-called "general" court martial, which is a court martial composed of a military judge and a panel of five officers of equal or higher rank to the accused. Under the procedure provided for under the NDA, this panel acts as a trier of fact: It determines the court martial's finding and its decision on any matter or question that is not a question of law or mixed law and fact, as the latter are questions within the jurisdiction of the military judge presiding over the General Court Martial.

[7] In the fall of 2020, Major Jacques' former counsel submitted two constitutional motions. These motions ask the military judge assigned to preside over Major Jacques' General Court Martial to declare certain sections of the NDA to have no force or effect because of a violation of the rights set out in section 7, paragraphs 11(d) and 11(f), and section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter], and order a stay of proceedings. These Charter

provisions protect the right to life, liberty, and security of the person (s 7), the right to be presumed innocent (s 11(d)), the right to a trial before a jury (s 11(f)), and the right to equality before the law (s 15).

[8] In her second constitutional motion, Major Jacques submits that the selection process for the members of the General Court Martial panel infringes her right to be presumed innocent until she is found guilty by an independent and impartial tribunal in a fair and public hearing [Motion on the Panels]. Major Jacques essentially maintains that the executive branch, through the Court Martial Administrator [CMA]—a federal government official—is solely responsible for selecting the members of a General Court Martial panel without any involvement of the judicial branch, and that neither the military judge nor the accused are involved in the selection of panel members. Major Jacques contends that this unilateral process by which the CMA selects General Court Martial panel members, the absence of a peremptory objection, the inability of the military judge to grant exemptions to the panel members, and the lack of representativeness in the composition of the panel are all constitutionally justified reasons for finding that her right to a trial by an independent and impartial tribunal and her right to equality have been violated.

[9] In October 2020, the CMA convened a General Court Martial presided over by Military Judge d'Auteuil. In addition to being the Deputy Chief Military Judge, Military Judge Auteuil has also been performing the duties and functions of Chief Military Judge since the retirement of Colonel Mario Dutil, who held this position until March 20, 2020. Major Jacques' military trail was then scheduled to be held before a General Court Martial in January 2021, over a period of approximately four weeks.

[10] In December 2020, Military Judge d'Auteuil dismissed Major Jacques' first constitutional motion. Between December 2020 and June 2022, the CMA postponed convening Major Jacques' General Court Martial on a few occasions, to allow the determination of her second constitutional motion, the Motion on the Panels. The hearing of this motion finally began on July 25, 2023, before Military Judge d'Auteuil.

[11] At the hearing of the Motion on the Panels, the new counsel for Major Jacques, Mr. Edmunds, called as witnesses Mr. Bruno Noury, the CMA in office at the time, as well as his predecessor in the CMA position, Ms. Simone Morrissey. When Mr. Noury testified, Military Judge d'Auteuil alluded to the fact that he himself had appointed Mr. Noury as CMA in May 2023 and had also been supervising the CMA's duties since June 2018. Major Jacques' counsel stated that he was uncomfortable with this situation and then expressed reservations about the impartiality of Military Judge d'Auteuil. However, Military Judge d'Auteuil responded that he would not have to assess the credibility or reliability of the witnesses, that Mr. Noury's testimony was rather technical, and that he did not see an issue of bias, adding that he would reconsider his position if necessary if the situation changed.

[12] In August 2023, the CMA formally postponed the commencement of Major Jacques' trial until April 15, 2024, in order to be able to first deal with the main outstanding preliminary issues.

[13] On September 6, 2023, Major Jacques filed, in the General Court Martial, an objection against Military Judge d'Auteuil alleging an apprehension of bias on his part. In the Decision made orally on September 13, 2023, and reproduced in *R v Jacques*, 2023 CM 3012, Military Judge d'Auteuil dismissed Major Jacques' objection, after having heard the parties.

[14] On September 18, 2023, Major Jacques filed her AJR requesting that this Court review the legality of the Decision by Military Judge d'Auteuil's dismissing the objection against him. The AJR's purpose is described as follows: [TRANSLATION] "Prohibition of Judge Louis-Vincent D'Auteuil [*sic*]". Military Judge d'Auteuil also allowed another application by Mr. Edmunds to adjourn the hearing of the Motion on the Panels because of this proceeding initiated before the Court. The continuation of the hearing on the Motion on the Panels was thus scheduled for March 5, 2024.

[15] Nearly three months later, on December 7, 2023, Major Jacques filed the notice of motion now before the Court for an interim writ of prohibition and an expedited hearing of the case. The purpose of the interim writ of prohibition is to prevent Military Judge d'Auteuil from hearing and deciding the Motion on the Panels and from continuing to preside over Major Jacques' hearing on the merits before the General Court Martial.

[16] At the time of the hearing of the motion for an interim writ of prohibition before this Court, on December 19, 2023, Major Jacques still had not filed her application record in support of her AJR. She filed this record the following day, on December 20, 2023.

III. Analysis

A. *Test for granting interim writ of prohibition*

[17] In cases where the Court has before it a motion enjoining it to prohibit a federal board, commission or other tribunal from exercising its jurisdiction provisionally under section 18.2 of the FC Act—as is the case here—it is actually dealing with an application to stop that

administrative decision-maker's proceedings (*Canadian National Railway Company v BNSF Railway Company*, 2016 FCA 284 at para 14 [*BNSF*]; *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 294 at paras 47–59; *Thibault v Canada (Director of Military Prosecutions)*, 2020 FC 1154 at para 33). Thus, when a party requests that the Court stay the proceedings of another federal agency, it wants the Court to prohibit that agency from continuing the proceedings and exercising the powers granted to it by Parliament (*Mylan Pharmaceuticals ULC v Astrazeneca Canada, Inc.*, 2011 FCA 312 at para 5 [*Mylan*]).

[18] In these circumstances, it is well recognized that in order to succeed, the applicant must meet the tripartite test established by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] (*Mylan* at para 5; *Vancouver Fraser Port Authority v GCT Canada Limited Partnership*, 2021 FCA 167 at para 5 [*Vancouver Fraser*]). This test is stringent and has three prongs:

1) Is there a serious issue to be tried?
2) Will the person seeking the interim relief suffer irreparable harm if this relief is not granted?
3) Does the balance of convenience favour granting or denying the interim relief?

[19] Major Jacques does not dispute that the *RJR-MacDonald* test governs her motion.

[20] Therefore, Major Jacques must first establish, following a preliminary review of the merits of the case, that there is a serious issue to be tried in her AJR, which generally means that the application underlying her motion is neither frivolous nor vexatious (*RJR-MacDonald* at 334, 335, 348). However, a high or elevated threshold may apply in certain specific circumstances,

such as when a mandatory interim relief is requested. Second, Major Jacques must demonstrate that she will suffer irreparable harm if she is denied the interim writ of prohibition. Finally, the burden is on her to establish that the balance of convenience—which is intended to determine which party would suffer greater harm if the appeal were allowed or dismissed pending a decision on the merits—favours granting the interlocutory relief sought (*R v Canadian Broadcasting Corp.*, 2018 SCC 5 at para 12 [*CBC*]; see also *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at paras 48–53 [*Ahousaht*] and *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 at paras 61–93 [*Okojie*]).

[21] At the outset, it is important to note that an interim writ of prohibition is an extraordinary measure in equity. Furthermore, the decision to grant or deny such an interlocutory measure is a discretionary exercise (*CBC* at para 27; *Association des Compagnies de Téléphone du Québec Inc. v Canada (Attorney General)*, 2012 FCA 203 at para 26). As this is an exceptional remedy, compelling circumstances must exist to justify the Court's intervention and the exercise of its discretion to grant the remedy sought. The burden is on Major Jacques to demonstrate that the conditions of this exceptional remedy have been met.

[22] Moreover, the tripartite test of *RJR-MacDonald* is conjunctive, so all its three prongs must be met in order to grant the remedy (*Vancouver Fraser* at para 6). None of the branches of the test can be seen as "an optional extra" (*Janssen Inc. v Abbvie Corporation*, 2014 FCA 112 at para 19 [*Janssen*]), and "failure of any of the three elements of the test is fatal" (*Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 at para 15 [*Ishaq*]; see also *Western Oilfield Equipment Rentals Ltd. v M-I LLC*, 2020 FCA 3 at para 7 [*Western Oilfield*]). That said, the three prongs of the test are not watertight compartments and should not be assessed in

complete isolation (*The Regents of University of California v I-Med Pharma Inc.*, 2016 FC 606 at para 27, aff'd 2017 FCA 8; *Merck & Co Inc. v Nu-Pharm Inc*, [2000] FCJ No 116 (QL) (FC) at para 13). Rather, they are flexible and interdependent: "Each one relates to the others and each focuses the court on factors that inform its overall exercise of the court's discretion in a particular case" *(Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 135). For example, the strength of the merits of the underlying action as demonstrated in the first prong may affect the consideration of irreparable harm and the balance of convenience in the second and third prongs (*British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97, rev'd on other grounds in 2021 FCA 84). However, this does not mean that one compartment can be completely empty and compensated by the other two being filled at high levels. In the end, the Court must be satisfied that each of the branches of the test has been satisfied, and none of the three components can be completely ignored and rescued by the other two.

[23] Finally, in *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [*Google*], the SCC noted that a primary and fundamental objective of the *RJR-MacDonald* test is that the Court must be satisfied that granting interlocutory injunctive relief is ultimately "just and equitable" in all the circumstances of the case (*Google* at para 25). Major Jacques rightly points this out in her submissions. In *Google*, the SCC reiterated that when exercising its discretion to grant or deny interim interlocutory relief, a court must consider the overall considerations of fairness and equity, and that the *RJR-MacDonald* test cannot be a simple exercise of checking the boxes in all three prongs of the test.

[24] The Court must therefore assess whether, in the end, granting the interim writ of prohibition requested by Major Jacques would be "just and equitable in all of the circumstances of the case", which "will necessarily be context-specific" (*Google* at para 25).

[25] In Major Jacques' opinion, her motion for an interim writ of prohibition raises a serious issue because the right she alleges in respect of her apprehension of bias on the part of Military Judge d'Auteuil is clear, she will suffer irreparable harm if the interim writ of prohibition is not granted, and the balance of convenience weighs heavily in favour of granting of the requested writ.

[26] I do not share Major Jacques' view but am rather of the opinion that she has not satisfied any of the elements required to be granted the requested interim relief.

B. *Serious issue*

[27] The first element of the three-prong test established in *RJR-MacDonald* is to determine whether the AJR and the evidence before the Court are sufficient to satisfy it on a balance of probabilities that Major Jacques raised a serious issue to be tried in her underlying application. The demonstration of a single serious issue suffices to meet this prong of the test (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, 2015 FCA 104 at para 26).

[28] I note that for the purposes of this first part of the *RJR-MacDonald* test, the issue does not relate directly to the apprehension of bias raised by Major Jacques but to a preliminary assessment of the merit of the proceeding underlying her motion (*CBC* at para 25), namely, her AJR challenging the legality of Military Judge d'Auteuil's decision not to recuse himself.

(1) Applicable test

[29] As I have already mentioned in *Letnes v Canada (Attorney General)*, 2020 FC 636 [*Letnes*], *Ahousaht* and *Okojie*, the requirement of a serious matter to be tried can give rise to three different thresholds (*Letnes* at para 40; *Ahousaht* at para 78; *Okojie* at paras 69–87). First, the usual and general test is not very stringent. There is no specific requirement to be satisfied to meet this test, and the Court must simply be satisfied that the issues raised in the underlying application are "neither frivolous nor vexatious" (*RJR-MacDonald* at 338–39). Therefore, the Court must not undertake a thorough analysis of the merits of the underlying application. Second, the test will be more stringent when the "result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR-MacDonald* at 338). Such situations require closer examination of the merits of the underlying application and have often been identified as requiring a "likelihood of success" in the underlying application. Third, for mandatory interlocutory injunctions, the SCC established in *CBC* that an even more stringent threshold is required: a "strong *prima facie* case". In these cases, there must be a "strong likelihood" of success when assessing the merits of the underlying application (*CBC* at paras 15, 17).

[30] In its submissions to the Court, the AGC maintains that the interim writ of prohibition requested by Major Jacques is mandatory because, in fact, it would require that a military judge other than Military Judge d'Auteuil be assigned to Major Jacques' case and preside over the General Court Martial against her. For this reason, the AGC argues that the more demanding test of a "strong *prima facie* case" should apply to the first prong, the serious issue to be tried.

[31] I do not have to decide this issue because, in my view, Major Jacques' motion does not even meet the low usual and general threshold requiring her AJR to be "neither frivolous nor vexatious". Needless to say, if a motion fails to cross this first threshold, the same will be true for the second, a strong *prima facie* case.

[32] As was correctly argued by the AGC in his submissions, Major Jacques' AJR does not raise any serious issues to be tried on the basis of the doctrine of prematurity and the principle of non-interference by the courts in ongoing administrative proceedings *(Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 18 [*Dugré FCA*]. An applicant cannot seek judicial review before the Court until the administrative process whose legality is challenged has been completed and all effective remedies have been exhausted. Considering this doctrine of exhaustion of administrative remedies and the non-intervention of courts of law at the interlocutory stage, Major Jacques' AJR is doomed to failure and has no chance of success in the circumstances.

(2) Doctrine of prematurity and principle of non-interference

a) *The principle*

[33] The Federal Court of Appeal [FCA] has on numerous occasions reiterated that courts of law must not intervene in an administrative proceeding until it is finalized and the parties to the administrative proceeding have exhausted all effective remedies available to them in the administrative process, absent exceptional circumstances (*Dugré FCA* at paras 34–37; *Alexion Pharmaceuticals Inc. v Canada (Attorney General)*, 2017 FCA 241 at paras 47, 50 [*Alexion*]; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at para 13; *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 30–33 [*CB Powell*]).

[34] I would like to take a moment to point out that the "prematurity" of a proceeding for interim relief is an issue usually addressed as part of the assessment of the "serious issue" branch of the *RJR-MacDonald* tripartite test (*Letnes* at para 45). In *Newbould v Canada (Attorney General)*, 2017 FCA 106 [*Newbould*], the FCA stated that prematurity and extraordinary circumstances are "a feature of the law of judicial review, and not the law of injunction" (*Newbould* at para 22). Therefore, such issues must be "considered under the heading of serious issue", the question being whether "their weight is such that the underlying application can be considered frivolous or vexatious" (*Newbould* at para 24). I note that in *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 202 [*Abdi*] or *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532 [*Rogan*], the Court did address the issue of the prematurity of interlocutory injunctive relief at the "serious issue to be tried" stage (*Abdi* at para 22; *Rogan* at para 12).

[35] That said, this prematurity issue permeates the assessment of each prong of the tripartite test set out in *RJR-MacDonald* and essentially reiterates the exceptional and discretionary nature of interlocutory injunctive relief. With this in mind, it could well be considered under one of the three prongs of the *RJR-MacDonald* test, as it in fact goes to the essence of the remedy sought and calls into question the exercise of the Court's discretion (*Letnes* at paras 46, 89–95).

[36] The principle of non-interference by the courts in an ongoing administrative proceeding, except in exceptional circumstances, is well established. Essentially, it provides that the administrative process must be complete before an applicant can seek relief from a court and ask a motion judge to intervene and stop such process in its tracks (*Okojie* at para 46). In a frequently

cited passage from *CB Powell*, repeated in many decisions, the FCA summarizes as follows the reasoning behind the application of this principle in the context of a judicial review application:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point ... .
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> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
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> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway … . Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience ... . Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge … .
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional

> circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high … . Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted ... . [T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
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> [Emphasis added. Citations omitted.]

[37] The SCC endorsed this principle of judicial restraint in the context of an ongoing administrative proceeding in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraphs 35–36 [*Halifax*].

[38] Under this general rule, forays to courts must remain a last resort, when other appropriate and effective avenues for obtaining relief are exhausted. In other words, when Parliament assigns authority to make decisions to administrative bodies and establish an exclusive regime under which particular administrative decision-makers exercise certain powers—as is the case, for example, for military justice—an applicant cannot bypass that regime and apply directly to a court of law. These administrative regimes are intended to provide rights to individuals in a given context, and their process must be followed to the end, barring exceptional circumstances (*Nosistel v Canada (Attorney General)*, 2018 FC 618 at para 51).

[39] As noted by the FCA, this principle of non-interference prevents fragmentation of the administrative process and piecemeal court proceedings and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway (*Halifax* at paras 35–37; *Herbert v Canada (Attorney General)*, 2022 FCA 11 at para 9 [*Herbert*]; *Alexion* at para 49; *CB Powell* at para 32).

[40] In *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 [*Wilson*], the FCA noted that the general principle of non-interference is based on two core public law values: "One is good administration—encouraging cost savings, efficiencies, promptness and allowing administrative expertise and specialization to be fully brought to bear on the problem before reviewing courts are involved. Another is democracy—elected legislators have vested the primary responsibility of decision-making in adjudicators, not the judiciary" (*Wilson* at para 31).

[41] Certainly, the doctrine of exhaustion of administrative remedies provides for certain exceptions. However, these exceptions only apply in "circumstances of exceptionality" or "circumstances of unusual urgency" (*BNSF* at para 17). Moreover, these exceptions are "very rare" (*Dugré FCA* at para 35; *Alexion* at para 50; *CB Powell* at para 33). The range of situations in which the general rule can be disregarded is therefore very limited, and the threshold for exceptionality is high (*CB Powell* at para 33). Exceptions require that the consequences of an interlocutory decision be so "immediate and radical" that they call into question the rule of law (*Herbert* at para 12; *Dugré FCA* at paras 35, 37; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at paras 56–61). Given the rigour of the principle of non-interference, the limit on the Court's intervention at the interlocutory stage is even described

as “next to absolute” (*Herbert* at para 12; *Dugré FCA* at para 37). Finally, the burden of establishing exceptional circumstances rests with the party raising them.

[42] Thus, the existence of a significant legal issue or concerns about procedural fairness prevent courts from broadening the exception to the rule against the premature intervention of courts in the administrative process (*CB Powell* at para 33). In particular, concerns raised about the bias of an administrative decision-maker are not in themselves exceptional circumstances allowing courts to intervene at the interlocutory stage and to depart from the general doctrine of exhaustion of remedies (*CB Powell* at para 33). Similarly, the existence of a jurisdictional issue does not allow for premature forays to courts whenever the administrative process raises the issue and provides for effective remedies (*CB Powell* at paras 39–40).

[43] In her submissions, Major Jacques argues that her remedy of prohibition would not be premature. Relying on the Court’s decision in *Dugré v Canada (Attorney General)*, 2020 FC 789 [*Dugré FC*], she argues that “the values underlying the general rule against premature judicial reviews take on less importance” when the consequences for the applicant are “so immediate and drastic that the Court’s concern about the rule of law is aroused” (*Dugré FC* at para 33, citing *Wilson* at paras 32–33). I am not satisfied by that argument. In citing *Dugré FC*, Major Jacques fails to mention that, in the same paragraph on which she relies, paragraph 33, the Court notes that *CB Powell* “does not accept that concerns about procedural fairness, impartiality, the existence of important legal or even constitutional issues, or concerns relating to so-called jurisdictional issues, constitute exceptional circumstances that would justify an anticipatory review by a reviewing court” (emphasis added).

[44] In the case at hand, it is clear that, on the one hand, Major Jacques still has adequate remedies before the military court and that, on the other hand, she has not demonstrated any exceptional circumstances that might enable the Court to depart from the principle of non-interference.

b) *Existence of adequate remedies*

[45] There is no doubt that the administrative regime established by the NDA clearly provides for another appropriate remedy for the grounds raised by Major Jacques with regard to her apprehension of bias on the part of Military Judge d'Auteuil to be fully heard: a possible appeal to the Court Martial Appeal Court [CMAC].

[46] As mentioned by the AGC, it is well established that a person subject to the Code of Service Discipline, as is the case with Major Jacques, may, under paragraph 230(b) of the NDA, appeal to the CMAC against a finding of guilt, if any. In such an appeal, the appellant may raise all grounds available to her, including those arising from all interlocutory decisions in the course of proceedings that may have an impact, directly or indirectly, on the finding of guilt (*Forsyth v Canada (Attorney General*) (TD), 2002 FCT 643 at para 11 [*Forsyth*]; *Rushnell v Canada (Attorney General)*, 2001 FCT 199 at para 21 [*Rushnell*]; *R v Nystrom*, 2005 CMAC 7 at paras 2–4 [*Nystrom*]; *R v Lachance*, 2002 CMAC 7 at para 7).

[47] For example, this is the case for an interlocutory issue of lack of jurisdiction (*Forsyth* at para 21; *R v Trépanier*, 2008 CMAC 3 at para 16) or for a preliminary objection and a reasonable apprehension of bias (*Nystrom* at paras 3–4). Thus, in *Forsyth*, the Court refused to

issue an interim writ of prohibition because the accused could eventually appeal to the CMAC and raise his interlocutory issues in his grounds of appeal (*Forsyth* at paras 11–13).

[48] The application of the principle of non-interference in this case will therefore not deprive Major Jacques of her rights, as she will still have the opportunity to contest, before the CMAC, the General Court Martial's decision in respect of the criminal charges, including any interlocutory issues that may have been raised and decided during the process provided for by the military court.

[49] In her submissions, Major Jacques relies heavily on the Court's decision in *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Justice)*, 2020 FC 330 [*Dutil FC*]. With all due respect, Major Jacques mistakenly relies on this decision, which concerned a right of appeal that was fundamentally different from the one at issue here. Rather, the case involved the Director of Military Prosecutions' narrower right of appeal under section 230.1 of the NDA with respect to a decision of a military judge who chose to recuse himself, not the opposite situation as is the case here. Furthermore, in *Dutil FC*, the military judge's decision effectively ended the matter before a verdict was rendered in the court martial in question, because the military judge who recused himself had decided that no other military judge could hear the case. Therefore, it was not an issue of the right of appeal under paragraph 230(b) of the NDA.

[50] Major Jacques also raises the fact that Military Judge d'Auteuil already recused himself in a similar situation in *R v Dutil*, 2019 CM 3003 [*Dutil CM*]. I note that *Dutil CM* first clarified that the test for recusal is whether a well-informed person, having thought the matter through and

viewing it realistically and practically, would be left with a reasonable apprehension of bias (*Dutil CM* at para 41). In that decision, Military Judge d'Auteuil noted that decision-makers must be—and appear to be—impartial, as stated by the SCC in *R v S (RD)*, [1997] 3 SCR 484 (*Dutil CM* at para 57). He also noted the rigour with which the issue of impartiality should be analysed (*Dutil CM* at paras 58–60). Finally, he stressed the importance of the presumption of innocence, noting that the potential penal consequences of the case could include incarceration (*Dutil CM* at para 58).

[51] In *Dutil CM*, Military Judge d'Auteuil had recused himself because, in the accused's opinion, the judge had become a friend and confidant for him. In addition to this personal relationship with the accused, Military Judge d'Auteuil was also aware of certain contextual elements surrounding the alleged incidents. Another decisive factor was the close professional relationship between military judges and court reporters, and the fact that many of the witnesses called to the General Court Martial were former or current court reporters from the Office of the Chief Military Judge. Military Judge d'Auteuil concluded that a well-informed person, having thought the matter through and viewing it realistically and practically, would conclude that he would be biased.

[52] This situation is unrelated to the situation in *Dutil CM*, and this precedent is therefore of no help to Major Jacques.

c) *Absence of exceptional circumstances*

[53] Furthermore, there are no exceptional circumstances in this case. As mentioned above, the threshold for exceptionality is high, and Major Jacques has not demonstrated that there are circumstances in this case that would justify the Court departing from the general and rigorous rule that a party cannot seek judicial review of an interlocutory administrative decision.

[54] In particular, the case law has repeatedly confirmed that an allegation of bias, no matter how serious, does not in itself constitute an exceptional circumstance to circumvent the principle of the exhaustion of remedies and non-intervention of courts of law at the interlocutory stage, where the administrative process allows these issues to be raised and provides for effective remedies in this regard (*Dugré FCA* at paras 35, 37; *CB Powell* at para 32; *Sztern v Deslongchamps*, 2008 FC 285 at paras 20, 44–46; *Air Canada v Lorenz*, [2000] 1 FC 494 at paras 20, 37, 39). There is also no general exception for issues of procedural fairness (*Girouard v Inquiry Committee Constituted Under the Procedures for Dealing With Complaints Made to the Canadian Judicial Council About Federally Appointed Judges*, 2014 FC 1175 at para 29).

[55] I would add that, besides her general apprehension of bias, Major Jacques does not allege or provide any evidence of exceptional circumstances in this motion. As noted by the AGC, Major Jacques only alleges unidentified issues relating to the credibility and reliability of her witnesses, Mr. Noury and Ms. Morrissey. There is nothing in the evidence currently on file to show that the alleged issue of bias is serious, and Major Jacques does not explain how Mr. Noury's credibility would be central to the debate on her Motion on the Panels or to her trial on the merits, or how Military Judge d'Auteuil could not decide her constitutional motion or

preside over the General Court Martial against her. The mere assertions of Major Jacques are not sufficient to demonstrate that there is a serious issue to be decided (*Rushnell* at para 19).

(3) Issue of bias

[56] In Major Jacques' opinion, the fundamental issue to be addressed in her underlying AJR is whether the professional and subordinate relationship between Military Judge d'Auteuil and CMA Noury establishes a reasonable apprehension of bias. She submits that the seriousness of this apprehension is well founded in law and in fact. She maintains that forcing her to proceed before a military judge whom she considers to be biased in itself raises a serious issue.

[57] I do not deny that the issue of bias raised in relation to Military Judge d'Auteuil is significant and complex. However, in the context of the AJR brought by Major Jacques before the Court, the key and determinative issue for the purposes of this motion to obtain an interim writ of prohibition is that of prematurity and exhaustion of remedies.

(4) Conclusion on serious issue

[58] In view of the foregoing, I find that Major Jacques has not demonstrated that her AJR raises a serious issue to be tried and that she has not satisfied this first prong of the *RJR-MacDonald* test. In view of this conclusion, it would not be necessary for me to consider whether there is irreparable harm or on what side the balance of convenience tips. Major Jacques did not satisfy a prong of the *RJR-MacDonald* test, which, according to FCA case law, is fatal to her application for an interim writ of prohibition (*Ishaq* at para 15).

[59] However, to complete the analysis, I will quickly examine the other two prongs of the test, to illustrate how Major Jacques does not meet them either.

C. *Irreparable harm*

[60] With respect to the second prong of the test set out in *RJR-MacDonald*, the issue is whether Major Jacques has provided sufficiently clear, concrete, and compelling evidence to demonstrate on a balance of probabilities that she will suffer irreparable harm between now and when her AJR is decided by the Court if she is denied the interim writ of prohibition.

[61] In Major Jacques' view, without the issuance of an interim writ of prohibition, she will suffer irreparable harm because a military judge who appears to be biased will be able to continue to preside over her General Court Martial and decide her Motion on the Panels. Still relying on *Dutil FC*, she contends that subjecting "the litigants of the Code of Service Discipline" to a court martial presided over by a biased judge is a "flagrant injustice" that must be prevented (*Dutil FC* at paras 171, 176).

[62] I am not satisfied by Major Jacques' arguments.

[63] The concept of "irreparable harm" refers to the nature of the harm suffered rather than its extent. It is harm that "cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald* at 341).

[64] The irreparable harm test is a strict one. The FCA has often highlighted the characteristics and quality of evidence necessary to establish irreparable harm in the context of

stays or interlocutory injunctions (*Canada (Health) v Glaxosmithkline Biologicals S.A.*, 2020 FCA 135 at paras 15–16; *Western Oilfield* at para 11; *Janssen* at para 24).

[65] First, the irreparable harm must result from clear, compelling, and non-speculative evidence (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7 [*US Steel*]; *AstraZeneca Canada Inc. v Apotex Inc.*, 2011 FC 505 at para 56, aff'd 2011 FCA 211). Second, it is not enough to state that irreparable harm is possible. The case law indicates that "[i]t is not sufficient to demonstrate that irreparable harm is 'likely' to be suffered" (*US Steel* at para 7). Rather, there must be a high likelihood that the applicant will suffer irreparable harm if the interim relief is denied (*Arctic Cat, Inc. v Bombardier Recreational Products Inc.*, 2020 FCA 116 at paras 19–20; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 [*Glooscap*]; *Ahousaht* at para 84). Furthermore, irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation (*Canada (Attorney General) v Oshkosh Defence Canada Inc.*, 2018 FCA 102 at para 24 [*Oshkosh*]; *Janssen* at para 24).

[66] Proof of harm cannot be limited to assumptions, speculations, hypotheticals, and arguable assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15–16 [*Gateway City Church*]). Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight (*Glooscap* at para 31). Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Gateway City Church* at para 16, citing *Glooscap* at para 31). In other words, 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" (*Oshkosh* at para 25; *Janssen* at para 24).

[67] In *Janssen*, the FCA further noted that "it would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief" (*Janssen* at para 24). Justice Stratas repeated the same phrase in *Oshkosh* at paragraph 25, and it was endorsed by Justice Nadon in *Western Oilfield* at paragraphs 11 and 12.

[68] The existence of a single ground that meets the required characteristics of irreparable harm is sufficient to satisfy the second prong of the test set out in *RJR-MacDonald*.

[69] As the AGC correctly argued, if no interim writ of prohibition is issued by the Court, three scenarios are possible: (1) Military Judge d'Auteuil grants Major Jacques' Motion on the Panels, and the AJR then becomes moot; (2) Military Judge d'Auteuil dismisses the Motion on the Panels, but Major Jacques is acquitted by the General Court Martial at the trial on the merits, which again makes the AJR moot; or (3) Military Judge d'Auteuil dismisses the Motion on the Panels and finds Major Jacques guilty of one or more counts following the General Court Martial, which then opens the door to an appeal of the verdict before the CMAC pursuant to paragraph 230(b) of the NDA and allows for the raising of any errors that may have had an impact on this verdict, including the interlocutory decision on Military Judge d'Auteuil's bias. The CMAC would then be well placed to decide the issues, given its undeniable expertise in military procedure.

[70] In all these scenarios, Major Jacques is therefore not subject to any irreparable harm in the absence of an interim writ of prohibition. The Court has already determined in another military justice case that forcing an applicant to stand trial before a court martial and postponing the final decision on an apprehension of bias does not constitute irreparable harm (*Rushnell* at paras 20–21).

[71] For all the foregoing reasons, having reviewed Major Jacques' evidence and arguments, I am not satisfied on a balance of probabilities that there is clear, compelling, and non-speculative evidence to demonstrate irreparable harm. Essentially, the various allegations of harm are not supported by detailed, particularized, and specific evidence and remain in the universe of speculations and hypotheticals. Therefore, the second prong of the *RJR-MacDonald* test is not met.

D. *Balance of convenience*

[72] Finally, I turn to the last prong of the *RJR-MacDonald* test, the balance of convenience. Under this third prong, the Court must determine which party will suffer the greater harm from the granting or refusal of the interim relief, pending a decision on the merits (*RJR-MacDonald* at 342). At this stage, the public interest must also be taken into account (*RJR-MacDonald* at 350).

[73] In Major Jacques' opinion, the balance of convenience weighs in her favour. Thus, she submits that the public interest and military discipline will be harmed if a military judge who appears to be biased can continue to preside over the General Court Martial against her.

Major Jacques submits that such a situation is an affront to the rule of law and undermines public confidence in the integrity of the judiciary.

[74] I do not agree with Major Jacques' analysis.

[75] The factors that must be considered in assessing the balance of convenience are numerous and vary in each individual case (*RJR-MacDonald* at 342, 349). The public interest is generally one of the important factors that the Court considers. It "includes both the concerns of society generally and the particular interests of identifiable groups" (*RJR-MacDonald* at 344). The harm that may have been identified under the second prong of the *RJR-MacDonald* test is again considered at this stage but is now assessed against other interests that will be affected by the Court's decision.

[76] With respect to this motion, I am of the view that several relevant factors weigh heavily in favour of the AGC. These factors are as follows: (1) the prematurity of the AJR and the availability of remedies to Major Jacques before the military court; (2) the absence of irreparable harm demonstrated by Major Jacques if an interim writ of prohibition is not granted; (3) the fragmentation of proceedings before the General Court Martial that are criminal in nature and the extension of timelines that would result from the issuance of an interim writ of prohibition; (4) the public interest in seeing military justice exercise the powers conferred upon it by Parliament; and (5) the long series of military justice precedents that have denied interim writs of prohibition similar to that sought by Major Jacques.

[77] In *Rushnell*, the Court stated that temporarily suspending military proceedings would set a significant precedent leading to premature forays before the Court, which would be impractical and not in the public interest (*Rushnell* at para 22). Fragmenting criminal proceedings must be avoided as much as possible because of all the disadvantages associated with it, including significant delays and inefficient use of limited judicial resources (*Bessette v British Columbia (Attorney General)*, 2019 SCC 31 at para 22; *R v Awashish*, 2018 SCC 45 at para 10). Furthermore, such consequences are inconsistent with the teachings of *R v Jordan*, 2016 SCC 27 [*Jordan*], in which the SCC determined delays in the criminal justice system affect fair trial interests, which is a constitutional imperative (*Jordan* at paras 19–28).

[78] If I compare the disadvantages put forward by both parties, I find, on a balance of probabilities, that the disadvantages weigh largely in favour of the AGC and against the issuance of an interim writ of prohibition.

E. *Just and equitable relief*

[79] In the case of an application for interim relief such as this, the Court must ultimately never forget the justness and equitableness of the outcome in light of the particular context of each case (*Google* at para 25; *Unilin Beheer BV et al v Triforest Inc.*, 2017 FC 76 at para 12). Therefore, the requirement of justness and equitableness is the last element that the Court must consider.

[80] In the circumstances of this case, I have no hesitation to conclude that it would be neither just nor equitable to grant the interim writ of prohibition requested by Major Jacques and that

this is not an appropriate case to exercise my discretion in her favour. The compelling evidence supporting this conclusion includes the absence of evidence of irreparable harm, the public interest in seeing military justice done, the prematurity of the AJR by Major Jacques, and the doctrine of exhaustion of administrative remedies.

[81] In my view, it is preferable to let the military court decide, through its own process, the issues raised by Major Jacques in her AJR. The legal issues raised by Major Jacques regarding her apprehension of bias on the part of Military Judge d'Auteuil are complex, and her application for a writ of prohibition is not sufficiently founded in law to justify the extraordinary intervention of the Court at this stage. In the circumstances of this case, what is just and equitable is to leave the issue of the bias of Military Judge d'Auteuil in the hands of the military court, knowing that his decisions will remain subject to the CMAC's review if necessary.

F. *Expedited hearing of case*

[82] At the hearing before this Court, Major Jacques did not address her ancillary application for an expedited hearing of her AJR.

[83] As I noted at the hearing, I am of the view that this application should not be granted in the circumstances. In early December 2023, the Court appointed Associate Justice Steele to be responsible for managing the AJR initiated by Major Jacques, and the Associate Justice has already convened the parties to a case management conference on January 18, 2024, to discuss, among other things, the next steps and the time frame of this case. It would be inappropriate for me to become involved in this process at this stage.

[84] Furthermore, in the context of this motion, Major Jacques did not make any strong arguments that would justify an expedited hearing of her AJR at this stage.

[85] I also note that Major Jacques did not file her application record in the AJR before December 20, 2023, more than three months after the filing of her AJR and after the hearing of this motion. This in no way reflects the situation of a party wishing to have their case expedited by the Court.

G. *Request to strike*

[86] In his submissions, the AGC asked that the Court, on its own motion, strike the AJR as there was no chance of success on the merits, having regard to the doctrine of prematurity and the principle of non-interference by courts at the interlocutory stage. However, I note that no motion to strike was filed by AGC in this file.

[87] I acknowledge that the FCA has made it clear that it can, on its own motion, raise the question of whether an appeal should be summarily dismissed and get rid of abusive recourses when it finds them (*Dugré FCA* at para 29; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 48, citing *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, [1995] 1 FC 588 (CA) at 600). However, in the particular circumstances of this case, and in view of the appointment of Assistant Justice Steele to manage the proceeding, it does not seem appropriate to strike Major Jacques' AJR.

[88] Certainly, the issue of the doctrine of prematurity and non-interference of courts at the interlocutory stage will play an important role in the AJR's fate. However, in my view, it is

important to decide the issue after the parties have been able to express their points of view on the subject and have had full opportunity to be heard (*Dugré FCA* at para 24). I am not satisfied that the context of this motion—including the absence of a motion to strike—has allowed Major Jacques, and even the AGC, to make all the meaningful submissions on the merits of the AJR. For the most part, the submissions received from the parties in this motion relate only to the appropriateness of an interim writ of prohibition.

[89] For these reasons related to compliance with the minimum standards of procedural fairness, I will not strike the AJR at this stage.

IV. Conclusion

[90] For all the above reasons, I find that Major Jacques did not meet the conjunctive tripartite test set out in *RJR-MacDonald* to justify granting the writ of prohibition she seeks. Furthermore, in the circumstances, it would not be just or equitable to grant the interim relief sought. Therefore, there are no exceptional circumstances that warrant the exercise of my discretion in her favour.

[91] The AGC is entitled to his costs.

ORDER in T-2010-23

THIS COURT ORDERS as follows:

1. The applicant's motion is dismissed, with costs.

"Denis Gascon"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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