COURT MARTIAL

Citation: *R. v. Spriggs*, 2019 CM 4002

Date: 20190131
Docket: 201831

General Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal T. B. Spriggs, Applicant

Before: Commander J.B.M. Pelletier, M.J.

Restriction on publication: Pursuant to section 179 of the *National Defence Act*, I direct that any information obtained in relation to this trial by General Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "S.M.", shall not be published in any document or broadcast or transmitted in any way.

DECISION ON DEFENCE APPLICATION FOR STAY OF PROCEEDINGS FOR ABUSE OF PROCESS

(Orally)

Introduction

[1] Corporal Spriggs has been ordered to appear and be tried before a General Court Martial on one charge laid under section 93 of the *National Defence Act* (*NDA*), preferred by a representative of the Director of Military Prosecutions (DMP) on 28 November 2018. The charge alleges that he "BEHAVED IN A DISGRACEFUL MANNER [. . .] in that he, on or about 25 July 2016, at or near Canadian Forces Base Borden, Ontario, did ejaculate on S.M. without her consent."

[2] Proceedings of the General Court Martial commenced on 28 January 2019 in Gatineau as directed in the convening order. As four notices of application had been received, members of the panel were not required to assemble. Preliminary matters raising issues of law are to be determined by myself as presiding military judge.

[3] On 28 January 2019, I granted an application by the prosecution for a publication ban on the identity of the complainant and dismissed another application by the prosecution for summary dismissal of this defence application for abuse of process. I have postponed the hearing and determination of another application by the prosecution for testimonial aid for a prosecution witness to be called at trial. Indeed, a ruling may prove to be unnecessary given this application which seeks a stay of proceedings.

The application and the evidence

[4] Counsel for the applicant submits that Corporal Spriggs was subject to abuse of process during the investigation and prosecution of the charge and that this abuse of process generally led to the infringement of his right to life, liberty and security of the person recognized under section 7 of the *Canadian Charter of Rights and Freedoms*, as well as the infringement of Corporal Spriggs' rights under sections 8, 9 and 10(*b*) of the *Charter*. As a remedy for these alleged violations, the applicant seeks a stay of the proceedings under subsection 24(1) of the *Charter*.

[5] In support of his application, counsel for Corporal Spriggs produced written arguments as requested during pre-trial teleconferences, amounting to a 31-page factum. He also produced two affidavits in support of the application: one from Corporal Spriggs, 13 pages in length with 17 exhibits in support, and one from Mrs. Garrett, a law clerk for the applicant's counsel, 5 pages in length with 19 exhibits in support. Corporal Spriggs also testified to relate facts as it pertains mainly to the circumstances of his arrest by military police and the administrative measures taken by his chain of command. The applicant also called a legal officer serving as defence counsel with the Director of Defence Counsel Services to provide evidence of legal facts as it pertains to recent developments at the Court Martial Appeal Court (CMAC) and Supreme Court of Canada (SCC) relating to the decision of *R. v. Beaudry*, 2018 CMAC 4 (*Beaudry*), which found on 19 September 2018 that paragraph 130(1)(a) of the *NDA* was unconstitutional because it deprives a member of the right to a trial by judge and jury for a civil offence for which the maximum sentence is five years or more.

[6] For his part, counsel for the respondent produced no evidence to support the prosecution's position on the application. The prosecutor did cross-examine Corporal Spriggs. As for written arguments, I accepted the prosecution's request that the 15-page notice of application in support of the prosecution's application to summarily dismiss the defence application be considered as a reply on this application.

Position of the parties

[7] The applicant takes issue with three forms of state misconduct. First, it is submitted that the arrest without warrant of Corporal Spriggs for sexual assault on 30 May 2017 was not necessary and was made to allow the military police to conduct a search incident to arrest to obtain Corporal Spriggs' smartphone, which the officers believed could yield incriminating evidence. In the course of the arrest, officers required that Corporal Spriggs surrender the passcode for his I-phone as a condition to contact counsel. Yet, when he did so after refusing on three occasions, the military police did not permit the applicant to use his smartphone to contact counsel of his choice. Instead, they transported Corporal Spriggs to the Saskatoon police station and placed him in a room where he could contact counsel using the phone in that room. They did not return his smartphone to him once released without conditions about 90 minutes after the arrest. A subsequent authorized search of the phone yielded no evidence in relation to the allegations in this case.

[8] The second form of state misconduct alleged is related to the administrative treatment by virtue of excessive restrictions imposed upon Corporal Spriggs' employment by his commanding officer during the investigation and prosecution of the charge. This violation was allegedly compounded both by unreasonable pre-charge delay generated by the time military police took to conduct the investigation and by unreasonable post-charge delay arising from errors and omissions by military police, the applicant's chain of command and military prosecutors.

[9] The third misconduct alleged, which further compounded post-charge delay, was the withdrawal, over 13 months after the initial charge was laid, of the charge under section 271 of the *Criminal Code* pursuant to paragraph 130(1)(a) of the *NDA*, and the substitution of a charge under section 93 of the *NDA*, notwithstanding that there was no material change in the evidence the military prosecutor intended to present. It is alleged that this substitution was pursued to circumvent the loss of jurisdiction arising from the *Beaudry* decision.

[10] The applicant submits that it is the joint and several infringements of *Charter* rights and further delays, errors and omissions which constitute an abuse of process. It is further submitted that only a stay of proceedings could remedy such violation.

[11] The respondent replies that there has been no misconduct by Crown agents in any of the three instances alleged and therefore no violation of Corporal Spriggs' *Charter* rights. The prosecution urges the Court not to speculate or second-guess the actions of the chain of command, military police and especially the prosecution, as the decision to lay a charge in this case is a matter of prosecutorial discretion that is not within the power of the Court to review.

The law

[12] Both parties agree that the abuse of process being alleged in this application falls squarely within the bounds of what is known as the residual category. Indeed, the

allegations being made do not threaten trial fairness, but risk undermining the integrity of the judicial process.

[13] Counsel agree that a stay of proceedings is the most drastic remedy a criminal court can order. Stays should be imposed on rare occasions. Only in the "clearest of cases" will a stay of proceedings for an abuse of process be warranted.

[14] I agree with counsel's position to the effect that the test used to determine whether a stay of proceedings is warranted is as set out by the SCC in *R. v. Babos*, 2014 SCC 16 (*Babos*) consists of three requirements:

> (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
> (2) there must be no alternative remedy capable of redressing the prejudice, and;
> (3) where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

Analysis

The conduct of the prosecution

[15] Even if the applicant's counsel stressed the cumulative effect of the alleged violations in reaching the high threshold warranting a stay of proceedings in the residual category, he did mention in argument that in his view the conduct that called the most for imposing a stay is the withdrawal of the initial charge under section 130 of the *NDA* for sexual assault and its effective substitution by a charge of disgraceful conduct contrary to section 93 of the *NDA*. I will therefore analyse this issue first as it may, on its own, warrant imposing a stay.

The sequence of events relating to the charges

[16] The facts in relation to the charges laid over time against Corporal Spriggs are not contested. First, a charge under section 130 of the *NDA* alleging an act constituting sexual assault contrary to section 271 of the *Criminal Code* was laid on 17 October 2017. A first preferral was made by Major Moorehead of the DMP on or about 4 April 2018, alleging an offence on 26 July 2016. After having been notified by defence counsel on 16 May 2018 of a discrepancy with the alleged date of the offence, Major Moorehead withdrew that first preferral and preferred another charge dated 24 May 2018, alleging the same offence under section 130 with an offence date of 25 July 2016. On 22 June 2018 this military judge was assigned to preside the trial by General Court Martial which had initially been set for 9 October 2018 in Regina, Saskatchewan. A convening order and order to assemble were prepared. Case management

teleconferences were held, pre-trial applications were discussed, as well as a schedule for filing of material to be ready for hearing applications on 10 October 2018 without the panel.

[17] However, on 19 September 2018, the *Beaudry* decision was released by the CMAC, making paragraph 130(1)(a) of the *NDA*, on which the charge was based, unconstitutional. Case management teleconferences continued to be held and applications filed, although the schedule for hearing applications was moved to December 2018, to give time for the prosecution to apply and obtain a stay of the declaration of unconstitutionality made by the *Beaudry* court. On 28 November 2018, the date set for another case management conference, a new charge was preferred alleging an offence under section 93 of the *NDA* and the previous section 130 charge was withdrawn. The charge sheet, dated 27 November 2018, alleges conduct of a sexual nature on the same date as the previous charge alleging sexual assault. This military judge was once again assigned to preside the trial by letter dated 28 November 2018. At the case management teleconference held on that day, discussions took place on issues such as applications and location of the trial.

[18] I find that for the purpose of determining if abuse of process has occurred with respect to the conduct of the prosecution in this case, the entire sequence of events from the time a charge was first laid to today is relevant. To his credit, the prosecutor has not alleged that the proceedings in this case were initiated by the preferral of 28 November 2018 and that anything which occurred before is irrelevant. I acknowledge that it is technically true that a withdrawal and new referral start the court martial process anew. However, that legal reality does not require adopting an overly technical approach that would exclude the consideration of events which led to the 28 November 2018 preferral. Indeed, there may have been several preferrals and convening orders issued pertaining to Corporal Spriggs but there is only one reason which justifies actions taken against him, that is the events of 25 July 2016 alleging sexual improprieties. There may be several processes involved, but there is only one case.

The facts supporting the charge

[19] The details of the incident that is the object of the charge are contained in two applications filed by the prosecution for a publication ban and testimonial aids. They are as follows, taken verbatim from paragraphs 7, 8 and 9 of the application for publication ban:

> "7. On or about 25 July 2016, the accused and complainant exchanged text messages. They agreed to meet at the complainant's room. The accused attended her room and they engaged in conversation.
>
> 8. The conversation soon led to consensual physical contact of a sexual nature. The complainant's shirt was removed. She and the accused were on her bed.

> 9 At this point the accused climbed on top of the complainant, straddling her. The complainant was pinned down. The accused placed his penis between the complainant's breasts. Shortly thereafter, he ejaculated onto the complainant's chest. The complainant did not consent to being pinned down, nor did she consent to this sexual act."

[20] These facts clearly support the charge of sexual assault initially laid. The notion of consent or the absence thereof in relation to the sexual activity in question, namely ejaculation, is also at the core of the charge of disgraceful conduct which Corporal Spriggs is currently facing. Indeed, consent is key to this charge as sexual activity between consenting adults in private has been found not to constitute disgraceful conduct in *R. v. Buenacruz,* 2017 CM 4014, paragraphs 85 to 88.

[21] It is trite to state that the same facts may support a variety of charges. A conduct that may constitute an assault or sexual assault can also constitute disgraceful conduct, as recognized over 20 years ago by the CMAC in *R. v. Marsaw,* [1997] CMAC-395. The interaction between alleged sexual assault and disgraceful conduct was observed more recently in cases such as *R. v. Chapman,* 2016 CM 4019 when a guilty plea was accepted on a lesser, alternative charge of disgraceful conduct with consent of the prosecution as the accompanying charge was laid under section 130 alleging sexual assault. The charge alleged that Master Warrant Officer Chapman "did insistently touch Corporal A.G. for a sexual purpose." Also, in *R. v. Brunelle,* 2017 CM 4001 the court allowed the substitution of a charge under section 93 to replace a charge under section 130 alleging sexual assault to allow a guilty plea and a joint submission to be presented to settle the matter between the parties. The charge alleged that Second Lieutenant Brunelle had "shoved his hands into J.L.P.'s pants, without her consent."

[22] Yet, this case is not about a set of facts that gave rise to a section 93 charge that could also have been charged as sexual assault. It is about a set of facts that were in fact the object of a sexual assault charge, as they should have been given the facts related above. That charge, vigorously contested by the accused, was changed for a section 93 charge without his consent, with a number of consequences, including in my view consequences on the accused's *Charter* rights.

Reviewing prosecutorial discretion

[23] Quoting from *R. v. Anderson,* 2014 SCC 41 at paragraphs 46 to 52 (*Anderson*), the prosecution submits that the selection of charges is part of prosecutorial discretion, which is entitled to considerable deference and is immune from judicial oversight except when a party claiming abuse of process establishes a proper evidentiary foundation. It is submitted that the applicant has failed to produce evidence of egregious conduct by the prosecution which would seriously compromise trial fairness and/or the integrity of the justice system. As no proper evidentiary foundation has been established, the prosecution submits that it was not under any obligation to provide reasons justifying its decision and has indeed elected not to do so by presenting no evidence in response to the allegations of the applicant.

[24] I agree with the law stated by the prosecution, as established in *Anderson*. Yet, I also note that at paragraph 45 of that decision, Moldaver J. writing for a unanimous Supreme Court reminds us that the Crown possesses no discretion to breach the *Charter* rights of an accused. The circumstances of this case, as demonstrated by the facts proven by the applicant, reveal clearly that the current charge of disgraceful conduct was laid to replace the previous charge of sexual assault as a result of the *Beaudry* decision. The facts alleged are the same and so is the identity of all parties involved and the issues at play, most notably consent.

[25] In *Beaudry*, Ouellette J.A. found for a majority of that CMAC bench that sexual assault committed in Canada is a civil offence even when charged as a military offence contrary to section 130 of the *NDA* and preferred for trial by court martial. As the offence is punishable by five years or more, it must be triable by judge and jury, found exclusively in civilian courts of criminal jurisdiction. This conclusion was stated in these words:

> "Civil offences are not offences under military law. Paragraph 130(1)(*a*) of the NDA is unconstitutional because it deprives a member of the right to a trial by judge and jury for a civil offence for which the maximum sentence is five years or more."

Therefore, as of 19 September 2018, Corporal Spriggs, who was then facing a charge of sexual assault to be tried by General Court Martial, obtained the recognition of a *Charter* right to be tried instead by a judge and jury in a civilian court of criminal jurisdiction.

[26] I conclude that by withdrawing the very charge which made Corporal Spriggs triable by a judge and jury in a civilian court of criminal jurisdiction to replace it by a purely military charge of disgraceful conduct triable only by court martial, the prosecution in effect deprived Corporal Spriggs of a recognized *Charter* right.

[27] I find that the applicant has presented sufficient evidence to establish on the balance of probabilities that the decision by the prosecution to withdraw the charge of sexual assault laid against Corporal Spriggs and replace it with a charge of disgraceful conduct was a direct result of the *Beaudry* decision and was designed to regain the military jurisdiction that had been lost following that CMAC decision, to the detriment of Corporal Spriggs enjoying a recently recognized *Charter* right to be tried by a judge and jury in a civilian court of criminal jurisdiction. In my view, the applicant has proven the existence of a rare and exceptional event that met the evidentiary threshold and justified an inquiry in the propriety of the prosecution's decision, in a manner similar to the case of *R. v. Nixon*, 2011 SCC 34, where the Supreme Court dealt with the rare repudiation of a plea agreement by the Crown.

[28] I hasten to state that the evidence of the actions by the prosecution I alluded to are not, in my view, the result of bad faith or misconduct. The motives guiding the

prosecution's actions may well be noble, for instance being motivated by a desire that justice be done on behalf of an alleged victim. However, in the circumstances of the *Beaudry* decision and the desire of Corporal Spriggs to oppose the allegations made against him, the motives appear to be improper. As stated at paragraph 37 in *Babos*, the integrity of the justice system may be implicated in the absence of misconduct. Also, as found by the dissent in the Newfoundland and Labrador Court of Appeal in *R. v. Hunt*, 2016 NLCA 61 (*Hunt*) at paragraph 80, affirmed by the SCC (2017 SCC 25), egregious Crown conduct is distinct from misconduct.

[29] The prosecution has decided not to present any evidence suggesting a reason for its decision to proceed the way it did. I therefore have to find that on the limited facts of this case, where an accused facing a charge that granted him a *Charter* right to trial by judge and jury found himself deprived of that right as a result of the prosecution's actions in circumventing the effect of a CMAC decision, the prosecution has engaged in egregious conduct that seriously compromises the integrity of the justice system. Indeed, I believe the prosecution has engaged in conduct that is offensive to societal notions of fair play and decency. In the circumstances of this case, such conduct constitutes an abuse of process.

Availability of a stay of proceedings

[30] It is useful at this point to get back to the test used to determine whether a stay of proceedings is warranted as set out by the SCC in *Babos*. I have no difficulties finding that the first requirement has been met. In my opinion, the wilful circumventing of a *Charter* right recognized by a court of appeal by prosecution imposing a different charge is the type of conduct that tests the limits of what society can tolerate in the prosecution of offences. Conducting this trial, even if it is fair, will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system.

[31] I must share that I have reached this conclusion in consideration of the very practical difficulties which may ensue in prosecuting the kind of conduct alleged in this case, based on the facts related by the prosecution and quoted above. This is not a case of sudden and unsolicited sexual groping. It very much looks like an encounter between people familiar to each other who engaged in a certain level of sexual activity, consensually at first, but which became at a certain point unlawful by the removal or lack of consent to a specific sexual activity. The law applicable to sexual assault has been developed throughout the years by legislation governing the issues of consent and belief in consent. Complainants in sexual assault cases are protected as it pertains to the admissibility of evidence of previous sexual activity with the accused or with anyone else. As raised by the applicant's counsel in argument, these protections would not apply as a matter of statute to a prosecution for disgraceful conduct under the *NDA*. When offered an opportunity to comment on that issue in argument, the prosecutor had no comment to offer. I have to conclude that there is a significant risk that carrying on with a trial for disgraceful conduct before a panel of a General Court Martial where an alleged victim has to testify about what is essentially known in Canadian law as a

sexual assault without the protection granted to any other person in the same situation would occasion further harm to the justice system.

[32] I now turn to the second stage of the test, where I must consider whether any other remedy short of a stay is capable of redressing the prejudice. In the context of this case, where the question of the requested stay of proceedings applies to this trial by General Court Martial, the application of this stage is somewhat different as I must consider whether ordering a stay of these proceedings could preclude the conduct of proceedings in civilian courts of criminal jurisdiction, which is the place where trials for sexual assault committed in Canada should be conducted according to the majority in the *Beaudry* court.

[33] The situation I am faced with is similar to the situation in *R. v. Wehmeier,* 2012 CM 1007, affirmed as for the result by 2014 CMAC 5, where it was held that a civilian accompanying the Canadian Armed Forces overseas and charged with three counts under section 130 of the *NDA* should not be tried by court martial unless justification is provided for loss of procedural rights that such trial entails. The CMAC agreed with the conclusion of the Chief Military Judge to the effect that the appropriate remedy was a termination without adjudication of the proceedings against the accused before the court martial. This conclusion was reached on the basis that a stay of proceedings can only be used in the clearest of cases under subsection 24(1) of the *Charter* and would, in the circumstances of the case, preclude the possibility of trial in the civilian criminal justice system by supporting a plea of *autrefois acquit*.

[34] The same circumstances apply here. Besides the important principle to the effect that a stay of proceedings is the most extreme remedy that can be imposed, it would also be in my view unfair to bar the possibility of a trial before a civilian court of criminal jurisdiction should a prosecution service be able to conduct such a prosecution. Indeed, such an outcome appears to be precisely what the *Beaudry* court envisaged. Another option could be to conduct a trial in military court under a charge laid under section 130 of the *NDA* should the *Beaudry* decision of the CMAC be reversed by the SCC following a hearing scheduled for March of 2019.

[35] Counsel for the applicant argued that only a stay of proceedings would remedy the harm alleged to have been done to Corporal Spriggs. Yet, as stated at paragraph 39 in *Babos*, it must be remembered that for cases such as this one which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward. A termination of the current proceedings under section 93 of the *NDA* would achieve this goal.

[36] The balancing of interests that occurs at the third stage of the test in *Babos* does not strictly need to be undertaken as I have found that an alternative remedy to a stay of proceedings is warranted in this case, after conducting the first two parts of the test. However, I am aware that when the residual category is invoked, the balancing stage

takes on added importance as the court must decide which of two options better protects the integrity of the justice system: staying the proceedings, or having a trial despite the impugned conduct.

[37] I would not want to leave the impression that I have decided on a remedy without consideration of the impacts of such a decision. Without presuming anything about police or prosecutorial standards and protocols, I do not believe there is a magic process by which cases such as Corporal Spriggs can be easily transferred to the civilian criminal justice system. The alleged offence here would have occurred at Canadian Forces Base Borden, Ontario, involving two persons from Regina and Saskatoon respectively as well as a potential witness who appeared to live in Montreal at the time of the investigation. Such a situation is typical of incidents involving Canadian Armed Forces members on bases across the country. The interest of military authorities to prosecute these cases is clear, in the enforcement of a policy which is meant to protect the sexual integrity, hence the dignity of its members. The interests, priorities and resources of a local prosecution service, often in smaller communities where military bases are located may not be so direct. It is the reason why sexual offences such as sexual assault were removed from the list of offences not triable by service tribunal at section 70 of the *NDA* in the 1998 reform. In short, I am aware of the potential difficulties to obtain the prosecution of Corporal Spriggs before a civilian court of criminal jurisdiction and of the fact that such prosecution may not happen.

[38] I do realize that a termination of the proceedings of this General Court Martial may mean that Corporal Spriggs realizes a windfall. In the practical context of how the *Beaudry* and other similar cases came to be litigated it makes sense: the challenge to military jurisdiction at the CMAC in relation to the right to trial by jury under paragraph 11(*f*) of the *Charter* was a coordinated effort by legal officers with the Director of Defence Counsel Services. These defence counsel are no doubt motivated by the promotion of *Charter* values, but also by immediate benefit to their clients. The challenge they launched would, if ultimately successful, oblige countless current and future accused persons to defend charges arising out of a military environment in civilian courts across Canada at their own expense instead of benefitting from a trial by court martial where their travel, counsel, witnesses and experts were made available at public expense. Uniformed defence counsel would not have placed such an advantageous program for all Canadian Armed Forces members, including themselves, in jeopardy if it was not for their duty to obtain a tangible benefit for their clients, especially the handful of clients facing serious charges at courts martial against whom the evidence was overwhelming. These include Master Corporal Stillman who was found guilty on the basis of a judicial confession covering the elements of the offences he was charged with (2013 CM 4028) and Corporal Beaudry who, as mentioned by the Chief Justice of the CMAC at paragraph 79 of his dissenting reasons, did not dispute on appeal the facts and the conviction.

[39] I also realize the price that a termination of proceedings will have for the complainant in this case. I can imagine there will likely be disappointment at not having the expected opportunity to have her day in court as expected. In September 2018, I was

myself literally minutes away from rendering findings in a court martial dealing with a number of offences including sexual assault and voyeurism when the *Beaudry* decision came out. As I walked in the courtroom to explain the situation to counsel and obtain their advice as to the way ahead, I could see the disappointment in the expression of the accused and complainants alike at being deprived of findings at the end of what was a long trial and difficult testimony as one would expect in such cases. That case dealt with offences charged under section 130 of the *NDA* allegedly committed in Canada while others were allegedly committed in the United States and thus not covered by the *Beaudry* ruling. Indeed, according to the *Beaudry* court, an act such as sexual assault constituting an offence under section 130 of the *NDA* is not an offence under military law for the purpose of paragraph 11(*f*) of the *Charter* if it is committed in Canada, but an act of sexual assault, tried by the same military tribunal, even by the same judge in the same trial, is such an offence under military law if it is committed outside of Canada.

[40] Regardless of the impacts I just alluded to, I remain convinced that the price to be paid as a result of the termination of these proceedings is worth the gain obtained in not submitting the complainant to a trial where the protection afforded to other complainants is not guaranteed to apply to her.

Impact of other breaches alleged

[41] The discussion thus far involved what was identified by counsel as the key argument of the applicant. Yet the application raised two other alleged violations and the applicant's counsel made the point that even if the three instances of alleged violations may not, individually, generate a prejudice sufficient to reach the high threshold required to warrant a stay of proceedings, the cumulative effect of the violations does reach that high threshold.

[42] Respectfully, the violations alleged by the applicant do not change my conclusion to the effect that the proper remedy to be imposed is a termination of the proceedings. In other words, I find that the evidence of the alleged violations presented in the course of the hearing of this application is insufficient to allow me to conclude that combined with the impugned prosecution's conduct discussed previously, they make this case fall in the clearest of case category, requiring that the remedy increase to a stay of proceedings. I have to tread carefully given the possibility that other judicial authorities have to assess the impact of the same alleged violations, but I will offer the following comments to address the applicant's arguments.

[43] First, I need to state that the administrative conduct of unit authorities that has been put in evidence does not raise an issue requiring that the Court engage in an examination of the reasons for the administrative actions taken. Even if the initial message from the commanding officer appeared to be quite severe, the proposed termination of the Class B reserve service employment was cancelled a few days later and Corporal Spriggs was placed in the same situation regarding leave as if that proposed measure had not occurred. Of course, there were restrictions on Corporal

Spriggs' employment, especially as it pertains to his duties as a medical professional, but in the context where there were serious allegations of sexual impropriety made against him, including at one point a charge of sexual assault, it cannot be said that such actions were unreasonable. The evidence does not reveal a need for the Court to enter into an exercise of evaluation of the administrative actions of authorities, an exercise it is not well equipped to conduct in any event.

[44] As for the pre-charge delay alleged and the prejudice allegedly suffered by Corporal Spriggs as a result, the length of delay in the circumstances of this case is insufficient to be deemed excessive. In light of that conclusion, I have to agree with the reasons of Hoegg J.A. in *Hunt* at paragraphs 71, 104 and 112 to the effect that judges should not embark in scrutinizing investigations and adherence to standards and protocols. I do acknowledge that Corporal Spriggs experienced stigma and other similar inconveniences in the course of the investigation and since having been charged, but the evidence presented to me on that point did not reveal any prejudice that would seem excessive in comparison to any other person suspected and charged for a similar offence in relation to a workplace. On that issue, I believe the remarks made by Hoegg J.A. at paragraphs 68 to 70 of *Hunt* to be particularly applicable here, in reference to the prejudice flowing from the circumstances leading to charges or complaints, as discussed in the SCC decision of *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44.

[45] The remaining alleged violation relates to the circumstances of the arrest of Corporal Spriggs on 30 May 2017, especially allegations of violations of rights under section 8, 9 and 10(*b*) of the *Charter*. The evidence presented in the course of the hearing of this application leads me to question whether the arrest was justified in the circumstances, as required by *R. v. Gauthier,* [1998] CMAC-414 at paragraph 24. Indeed, no formalities are required to be performed in the military justice system in relation to arrest. There is no need for a charge to be laid shortly after an arrest is made. In fact, Corporal Spriggs was charged almost five months later. The only thing the arrest brought was an opportunity to search incident to arrest which yielded Corporal Spriggs' smartphone. Absent any explanation offered by the prosecution, by witnesses or otherwise, I have to conclude that the arrest was conducted to obtain an opportunity to access the phone and the transport to the Saskatoon police station to obtain an opportunity for Corporal Spriggs to provide an audiovisual recorded statement should he choose to do so, even if he had refused two previous invitations to make a statement in the previous months. I find there has been a violation of section 9 and section 8 rights in the circumstances of this case. However, I do not find any violation of 10(*b*) rights on the evidence presented to me. Asking Corporal Spriggs for the passcode of his I-phone in order to obtain the coordinates of his counsel was not demonstrably unreasonable in light of the fact that he was given access to counsel in an appropriate setting as soon as practicable in the circumstances and in the absence of evidence that the passcode was used to access private information.

[46] Turning to the issue of remedy, I do not believe the gravity of the breaches is of the type that would justify imposing a stay of proceedings as a remedy under subsection

24(1) of the *Charter*, alone or in combination with the impugned conduct of the prosecution. The arrest and detention lasted about 90 minutes, Corporal Spriggs was not subject to abuse or improper violence and the data contained in his phone was accessed only following a properly authorized search warrant. The violations here are of the type that would warrant a remedy such as a reduction of sentence if found guilty at trial, as was imposed previously by courts martial in cases such as *R v Donald,* 2012 CM 4021 and *R v Fondren,* 2011 CM 4005.

Conclusion

[47] I have found that Corporal Spriggs was subjected to an abuse of process in the rare circumstances of this case, by the decision of a representative of the DMP to essentially replace the charge of sexual assault contrary to section 130 of the *NDA* that he was facing at the time the *Beaudry* decision was rendered by a charge under section 93 of the *NDA*, thereby depriving him of his newly acquired *Charter* right to have the charge of sexual assault heard by a judge and jury in civilian courts of criminal jurisdiction.

[48] I have determined that the proper remedy for this abuse of process is to order the termination of the proceedings of this General Court Martial.

FOR THESE REASONS, THE COURT:

[49] **GRANTS** the defence application in part.

[50] **TERMINATES** the proceedings.

Counsel:

The Director of Military Prosecutions as represented by Major G. J. Moorehead, Counsel for the respondent

Mr R. Fowler, Law Office of Rory G. Fowler, 221 Queen Street, Kingston, ON K7K 1B4, Counsel for the applicant, Corporal T.B. Spriggs