



COURT MARTIAL

Citation: *R. v. Simms*, 2016 CM 4022

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Docket: 201449

General Court Martial

17 Wing, Canadian Forces Base Winnipeg
Winnipeg, Manitoba, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Master Warrant Officer A.W. Simms, Applicant

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

DECISION ON AN APPLICATION FOR A STAY OF PROCEEDINGS ASSERTING UNLAWFUL ARREST AND DETENTION OF THE ACCUSED

Introduction

[1] This is an application submitted by defence for a stay of proceedings of this General Court Martial on the basis of the alleged illegal arrest and subsequent unlawful detention of the accused, Master Warrant Officer Simms, on 30 May 2014.

[2] Master Warrant Officer Simms faces five charges in this trial, all under section 130 of the *National Defence Act (NDA)*. Four of these charges allege that on 30 May 2014, at Winnipeg International Airport, he committed the following offences, namely: assault causing bodily harm; assault on a peace officer; resisting a peace officer and uttering threats against Corporal, now Master Corporal Hall, a member of the military police, contrary to sections 267(b), 270(1)(a), 129(a) and 264.1(1)(a) of the *Criminal Code*. The fifth charge allegedly committed at the same time and at or near the same place, alleges that the accused uttered threats against Corporal Chris Paradise, another member of the military police, contrary to section 264.1(1)(a) of the *Criminal Code*.

[3] This General Court Martial began its proceedings on 27 April 2015 at 17 Wing Winnipeg, as directed in the convening order. Members of the panel were not present as defence counsel had provided notice of a number of applications which had to be heard and determined by myself as the presiding military judge. I heard and ruled on two applications on the 27th and 30th of April respectively and heard arguments from counsel on the current application based on testimony given by witnesses previously during the week. Yet, I reserved making a finding until the close of the prosecution's case before the panel and the presentation of supplementary submissions by counsel, in accordance with a decision I made on 16 April 2015 on an application from defence concerning the timing of the hearing and determination of this application.

The facts

[4] The evidence relating specifically to this application was obtained at the hearing of April 2015 when the circumstances surrounding the five charges were described in testimony by Constable Ainley from the Winnipeg Police Service and by Master Corporal Hall from the military police, both of whom were present at the time of the alleged offences. The evidence heard from prosecution witnesses during the trial in January 2016 generated more precision as to what had taken place, and I take it from the submissions of counsel that it can be used to complete the evidentiary picture as required. The following facts constitute the narrative of events surrounding the arrest of the accused on 30 May 2014.

[5] On that day Master Warrant Officer Simms was travelling on leave to Las Vegas with his wife, also a member of the Canadian Armed Forces (CAF). The couple initially flew from Ottawa to Winnipeg where they had a stopover of several hours at Winnipeg International Airport before having to take a subsequent flight to their ultimate destination. As the flight to Las Vegas was about to be boarded at around 9:20 p.m., a decision was made by the WestJet supervisor to deny boarding to the couple on the basis of perceived intoxication and disruptive behaviour, especially from Master Warrant Officer Simms' wife, affecting other passengers waiting to board the flight in the departure lounge.

[6] Members of the Winnipeg Police Service from a detachment at the airport were called to the gate at the request of the WestJet supervisor. Constable Ainley explained to the couple that boarding was denied. She tried to convince them to leave the restricted area in which they were not allowed to stay because they no longer had any boarding privileges. That discussion was unsuccessful. As a result Master Warrant Officer Simms and his wife were taken into custody in holding cells located at the airport.

[7] The military police was called, in application of Winnipeg Police Service policy. Indeed, Master Warrant Officer Simms had disclosed that he and his wife were members of the CAF, a fact confirmed when their identification cards were examined. Master Corporal Hall, a member of the military police on patrol duty at the city at the time with his partner Corporal Chris Partridge, was informed, by a radio call from

dispatch, of the fact that two Canadian Armed Forces members were detained at the airport. He conversed with the Winnipeg Police Service sergeant-in-charge at the airport unit who informed him of what had occurred previously and the reasons for the placement of Master Warrant Officer Simms and his wife in detention. Master Corporal Hall decided to proceed to the airport.

[8] Upon arrival at the Winnipeg Police Service offices within the airport, Master Corporal Hall heard yelling and screaming coming from the holding cells area. He once again obtained information as to what had occurred previously and examined the photocopy of the identification cards of both Master Warrant Officer Simms and his wife showing they were members of the CAF, Regular Force.

[9] Master Corporal Hall was also told that, although Master Warrant Officer Simms and his wife could not be released from custody due to their level of intoxication and aggressiveness, Winnipeg Police Service would not be laying criminal charges. Consequently, custody of both could be taken over by the military police.

[10] At that point, Master Corporal Hall proceeded to an area where the two holding cells were located. At Master Corporal Hall's request, the door to the holding cell on the right-hand side was opened so Master Corporal Hall could speak with Master Warrant Officer Simms. Upon the door being opened, Master Corporal Hall found himself in close proximity to Master Warrant Officer Simms who was standing in the doorway very close to him. Master Warrant Officer Simms was irate, angry and was yelling at him. Master Corporal Hall could smell alcohol on the breath of Master Warrant Officer Simms who appeared to be intoxicated by virtue of symptoms such as slurred speech and unsteadiness. Master Corporal Hall proceeded to inform Master Warrant Officer Simms that he was under arrest for drunkenness.

[11] When informed of his arrest, Master Warrant Officer Simms did not comply with direction to step away from the door towards the back of the cell to allow for mechanical restraints to be placed on him. Instead, Master Warrant Officer Simms continued to yell at Master Corporal Hall at very close range. Master Corporal Hall then pushed Master Warrant Officer Simms in what he described as an attempt to create sufficient physical separation for his safety and to effect the arrest. At that point, Master Warrant Officer Simms threatened to kill Master Corporal Hall. He placed his hands around Master Corporal Hall's throat, pushing him out of the holding cell. Master Corporal Hall was then quickly assisted by his colleague from the military police and by members of the Winnipeg Police Service to push Master Warrant Officer Simms to the back of the holding cell, allowing Master Corporal Hall to place mechanical restraints on him.

[12] Master Warrant Officer Simms was then brought back in restraints to the area outside the holding cells where, following some resistance and more yelling of insults to police officers, a productive discussion could take place, leading to Master Warrant Officer Simms being accompanied by Master Corporal Hall and Corporal Paradise through the airport's public area to a military police patrol car, without incident.

[13] Master Warrant Officer Simms was then transported to cells on base at 17 Wing Winnipeg where he spent the night. After having been seen by a medical officer, he was released the next day and taken, with his wife, in an unmarked military police vehicle to Winnipeg International Airport. The couple was able to resume their travel to Las Vegas, WestJet having agreed to rebook them without cost.

[14] The grounds mentioned by Master Corporal Hall to effect the arrest of Master Warrant Officer Simms are that he was proceeding to Winnipeg International Airport to assist in relation to an offence of drunkenness, as the result of his discussion with Winnipeg Police Service officers on the phone. Master Corporal Hall testified that once he got there, he was able to confirm the grounds of arrest of Master Warrant Officer Simms for the offence of drunkenness upon approaching the holding cell occupied by Master Warrant Officer Simms, by virtue of the combination of impairment, the smell of alcohol and the disorderly behaviour of Master Warrant Officer Simms. Verification of the identity cards of the individuals detained reassured him that he had jurisdiction to act in relation to them as they were members of the Regular Force and, therefore, subject to the Code of Service Discipline at all times. In his opinion, he had jurisdiction as a member of the military police to arrest these persons for drunkenness.

Submissions of the parties

The applicant

[15] The defence requests a stay of proceedings on all charges on the basis that the arrest by Master Corporal Hall was unlawful and a violation of Master Warrant Officer Simms' rights under section 9 of the *Charter* not to be arbitrarily detained. As the alleged offences in this trial were the direct result of the unlawful attempt by Master Corporal Hall to arrest Master Warrant Officer Simms, irreparable prejudice will be caused to the integrity of the judicial system if the prosecution is allowed to continue.

[16] More precisely, the applicant argues that the actions of Master Corporal Hall did not constitute an arrest as Master Warrant Officer Simms was at the time lawfully detained by the Winnipeg Police Service. The only way the military police could legally obtain custody of Master Warrant Officer Simms was through a transfer meeting the requirements of section 527 of the *Criminal Code*. As these requirements were not met in this case, Master Warrant Officer Simms's detention was unlawful and, therefore, arbitrary and a violation of his *Charter* rights. Alternately, the applicant submits that if Master Warrant Officer Simms was rearrested, that arrest by Master Corporal Hall was unlawful as it did not comply with the requirement of subsection 495(2) of the *Criminal Code* applicable to the military police arresting without warrant under the Code of Service Discipline, by virtue of the Court Martial Appeal Court decision in *R. v. Gauthier*, CMAC-414 at paragraphs 24 to 26.

The prosecution

[17] In reply, the prosecution argues that there was no transfer of Master Warrant Officer Simms and, therefore, section 527 of the *Criminal Code* does not apply. As for the arrest by Master Corporal Hall, it was done entirely in good faith and complied with the applicable law found at section 156 of the *NDA*. The requirements of subsection 495(2) of the *Criminal Code*, before an arrest without warrant can be effected, do not apply. Even if they did, the prosecution argues that the conduct of Master Corporal Hall in this case met these requirements and, therefore, the arrest and subsequent detention were lawful. If a breach was to be found the prosecution alleges that the remedy of a stay of proceedings proposed by the applicant will not be appropriate given the manner and nature of the circumstances of this case and the serious offences faced by the accused.

Analysis

The issues

[18] The parties conglomerated arguments reveal three questions relevant to this application:

- (a) Were the actions of Master Corporal Hall in obtaining the custody of Master Warrant Officer Simms from the Winnipeg Police Service governed by the requirements of section 527 of the *Criminal Code*?
- (b) Did the arrest by Master Corporal Hall violate Master Warrant Officer Simms' rights under section 9 of the *Charter*?
- (c) If so, what's the appropriate remedy for the violation?

[19] It is important to state what is not in issue in this application:

- (a) It is common ground that the applicant was liable to arrest under the Code of Service Discipline at the time.
- (b) The applicant does not challenge the actions of the Winnipeg Police Service officers in arresting and detaining Master Warrant Officer Simms or in calling the military police to inform them of the fact that Master Warrant Officer Simms and his wife were in their custody at the Winnipeg International Airport. This application concerns the actions of military police only.
- (c) The status of military police officers involved as peace officers as defined in section 2 of the *Criminal Code* is not challenged.
- (d) The applicant admits that in the context of his intervention, Master Corporal Hall had formed a belief that the offence of drunkenness had been committed by Master Warrant Officer Simms at the time of

effecting the arrest and that the belief was reasonable based on the information received from Winnipeg Police Service officers and his own observations.

First issue: the application of section 527 of the Criminal Code

[20] The applicant submits that section 527 of the *Criminal Code* is the only mechanism by which a person in the custody of a peace officer may be transferred to the custody of another peace officer. As the requirements of subparagraph 7 of these provisions were clearly not met in this case, the transfer was done without authority and, therefore, unlawful.

[21] This argument does not conform to a modern interpretation of the text of section 527, along with its title, synopsis and annotations in the annotated version of the *Criminal Code* used by the court and counsel. Indeed the synopsis in the 2016 version of the *Martin's Annual Criminal Code* reveals that:

This section sets out the procedure to procure the attendance of a prisoner at his preliminary hearing, the trial of his charge, or to give evidence in criminal proceedings.

[22] On that authority, the section does not appear to apply to the facts of this case. The applicant was unable to present any authority in doctrine or case law to demonstrate otherwise in support of his argument. The burden of proving a *Charter* violation rests on the applicant in the first instance whether the alleged violation is demonstrated by facts, law, or both. I find that this burden has not been met in this case. The violation alleged has simply not been demonstrated. In the absence of such demonstration there is no obligation on the respondent to disprove the argument of the applicant. In my opinion, what occurred here may well be within the exercise of the discretion of one police agency to decide not to lay charges within its jurisdiction and invite another police force to take over the custody of a person detained should that police force feel the circumstances warrant its intervention by virtue of its own jurisdiction. Such occurrence may generate a *de facto* transfer of the custody of the person detained. However, I have not been convinced that such a transfer is subject to the procedure foreseen at subsection 527(7) of the *Criminal Code*, as alleged by the applicant.

Second issue: Did the arrest by Master Corporal Hall violate Master Warrant Officer Simms' rights under section 9 of the Charter?

Introduction

[23] The argument of the applicant requires an analysis of decisions of Master Corporal Hall to both effect the arrest and to subsequently detain Master Warrant Officer Simms in holding cells at 17 Wing Winnipeg.

The grounds for the arrest of Master Warrant Officer Simms

[24] In his testimony, Master Corporal Hall explained that his interaction with Master Warrant Officer Simms was justified by the fact that the information obtained from Winnipeg Police Service officers on the previous actions of Master Warrant Officer Simms, combined with the yelling and screaming emanating from the holding cells, were sufficient for him to form reasonable and probable grounds to believe that Master Warrant Officer Simms had committed the offence of drunkenness found at section 97 of the *NDA*. The relevant portions of that section reads as follows:

[T]he offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,

- (a) is unfit to be entrusted with any duty that the person is or may be required to perform; or
- (b) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[25] Master Corporal Hall justified his decision to arrest Master Warrant Officer Simms and informed him of that arrest by the fact that once he was in front of Master Warrant Officer Simms, in the doorframe of the holding cell, Master Warrant Officer Simms was irate and angry, he was yelling at him, he smelled of alcohol and appeared to be intoxicated by virtue of symptoms such as slurred speech and unsteadiness of his feet. Master Corporal Hall based his decision on the power of arrest without warrant granted to those appointed as military police officers at section 156 of the *NDA*, the relevant portion of which reads as follows:

156 Officers and non-commissioned members who are appointed as military police under regulations for the purposes of this section may

- (a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence . . .

[26] The applicant acknowledges that Master Corporal Hall had reasonable and probable grounds to believe that Master Warrant Officer Simms had committed the offence of drunkenness. In my view, Master Corporal Hall's grounds extend further, he found Master Warrant Officer Simms committing the offence of drunkenness.

The sufficiency of these grounds in light of the Gauthier decision

Applicant's argument

[27] Yet, according to the applicant, the grounds of arrest found at section 156 of the *NDA* are not sufficient in law to justify making the arrest based on the decision of the CMAC in *R. v. Gauthier* [1998] CMAC-414 of 23 June 1998. The applicant submits that on the basis of that decision, Master Corporal Hall made a mistake in the exercise of his power to arrest by failing to ensure not only that he had the power to arrest under

section 156 of the *NDA*, but also that he complied with the restriction found in subsection 495(2) of the *Criminal Code* to the effect that:

- (2) A peace officer shall not arrest a person without warrant for
 - (a) an indictable offence mentioned in section 553,
 - (b) an offence for which a person may be prosecuted by indictment or for which he is punishable on summary conviction, or
 - (c) an offence punishable on summary conviction,
 in any case where
 - (d) he believes on reasonable grounds that the public interest, having regard to all circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,
 may be satisfied without so arresting the person, and
 - (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

[28] The applicant submits that none of the three requirements of subparagraph (d) were met in this case, including “(iii) prevent the continuation or repetition of the offence or the commission or another offence.”

[29] Indeed, it is argued that the arrest of Master Warrant Officer Simms was done for the purpose of moving him from the Winnipeg Police Service cells to military police cells. This would do nothing to prevent the continuation or repetition of the offence. In fact, according to the applicant, the arrest not only failed to prevent but provoked the commission of other offences; namely, those subject to the charges in this trial. As a consequence, the arrest was unlawful and his subsequent detention arbitrary in violation of section 9 of the *Charter* as per *R. v. Grant*, [2009] 2 S.C.R. 353.

[30] In support of its argument, the applicant cites paragraph 26 of the *Gauthier* case where Letourneau JA wrote as follows:

With the advent of the Charter and the constitutionalization of the protection against arbitrary arrest and detention, the requirements governing the exercise of the power of arrest which are found in the Criminal Code . . . have become minimum requirements for the valid exercise of the power of arrest.

The Gauthier case does not require compliance with the Criminal Code in all circumstances

[31] I don't agree with the contention of the applicant to the effect that this sentence from paragraph 26 of the *Gauthier* case requires *ipso facto* the military police to comply with the restrictions found in subsection 495(2) of the *Criminal Code*.

[32] Indeed, section 495 was mentioned in *Gauthier* as an example, as evident from the opening words of paragraph 24, to illustrate the very important principle in the previous paragraph to the effect that:

[I]t is not enough that the power exist[s]. The exercise of the power must also be justified in the circumstances.

[33] For that reason, the explanation provided on the content of section 495 was done by paraphrasing some of the content without quoting its text. That summary omitted an important element: the fact that subsection 495(2) applies only to some *Criminal Code* offences, namely, the less serious types enumerated at subparagraphs (a) (b) and (c) of subsection 495(2).

[34] It would have been well known to Letourneau JA that military police may deal with a range of offences, from very serious to severe, under Canadian law, even when committed outside of Canada. Therefore, he could not have meant that the restrictions of subsection 495(2) apply to all arrests in every circumstances.

The interaction between the Criminal Code and the NDA

[35] Furthermore, it could not be intended that subsection 495(2) of the *Criminal Code* itself applies literally to limit a power granted by the *NDA*. As provided at section 5 of the *Criminal Code*, none of its provision may affect the *NDA*, the law which governs the Canadian Armed Forces. These two important Acts of Parliament stand on equal footing. Any desire as a matter of policy to import into the *NDA* portions of the *Criminal Code* require the intervention of Parliament. This can be done by importing sections of the *Criminal Code* into the *NDA* provisions either expressly, for instance, the definition of designated offence at section 153 of the *NDA*; or implicitly, for instance, section 179 of the *NDA* on powers of a court martial; or generally, allowing *Criminal Code* offences, for instance, to become *NDA* offences by section 130.

[36] It can also be done by adding to the *NDA* provisions implementing a scheme similar to the one found in the *Criminal Code*. Most notably this was done with the provisions pertaining to arrest without warrant in recent amendments to section 155 and 156 of the *NDA* to include the two-tiered scheme very similar to the one in section 495 of the *Criminal Code*, by which the power of arrest without warrant of military police is restricted for offences that are not serious offences.

[37] These amendments I refer to must have been in the mind of Letourneau JA who expressed his surprise in paragraph 26 of *Gauthier* that they had not been done in 1998.

Indeed, these amendments were tabled in Parliament in October 2011 and passed in June 2013. Unfortunately, they have yet to come into force over two years later. When they do they will incorporate an arrest regime similar to that of section 495 of the *Criminal Code*, but adapted to the language and scheme of the Code of Service Discipline. In my view, that is the only sensible way to import *Criminal Code* provisions into the *NDA*. Applying section 495 out of the context in which it operates as part of a scheme found at Part XVI of the *Criminal Code* will not make sense, as section 495 is meant to allow the efficient functioning of a justice system which is very different from the military justice system where section 156 is found.

The Criminal Code and principles of fundamental justice

[38] Of course, if subsection 495(2) of the *Criminal Code*, as paraphrased at paragraph 26 of *Gauthier*, precisely outlined the principle of fundamental justice under section 7 of the *Charter*, it would impose itself on the military justice system. Yet, if that had been the case, Letourneau JA would have stated it clearly.

[39] Subsection 495(2) did not outline a principle of fundamental justice in 1998 and does not outline such a principle now. Even if that section is in no doubt inspired by the principle against arbitrary arrest and detention, it does not express the extent of that principle. Powers to arrest and detain without warrant granted to peace officers, including members of the military police, are found elsewhere in the *Criminal Code*; section 31 for instance and, in other laws, such as the *Intoxicated Persons Detention Act* applied by the Winnipeg Police Service in this case and in the common law as evidenced by the *Waterfield* principle argued by the applicant. The applicant was unable to point to any case where a court had applied the strict requirements of subsection 495(2) as a constitutional requirement for the valid exercise of the power to arrest without warrant.

What the Gauthier case stands for

[40] The key statement to take from *Gauthier* is found at paragraph 24 to the effect that:

[I]n the realm of arrest and detention, because of the particularly prejudicial nature of these powers to an individual's rights and freedoms, it is not enough that the power exist. The exercise of the power must also be justified in the circumstances.

This is good law, as recognized in *R. v. Mann*, 2004 3 S.C.R. 59:

35 Police powers and police duties are not necessarily correlative.

[41] On the basis of that key statement, Letourneau JA examined in *Gauthier* the exercise by the military police of their power to arrest in relation to Corporal Gauthier at paragraphs 27 and 28. In the circumstances of that case, he found that the arrest was not justified. Essentially, the *Criminal Code* provisions were used in *Gauthier* as a tool to evaluate whether the exercise of the power to arrest without warrant was reasonable.

However, there was no finding that the rights of Corporal Gauthier had been breached because the requirement of subsection 495(2) were not met on the facts of the case. The finding of a violation was based on a combination of factors, most importantly the fact that Corporal Gauthier was arrested three days after he would have uttered threats spontaneously following an isolated incident in the absence of any indications the offence would continue or be repeated. Also, Letourneau JA found that Corporal Gauthier should have been released immediately following his arrest in application of section 158 of the *NDA* not the *Criminal Code* and that his detention for 13 days occurred in an inadequate detention facility. Those facts form the *ratio* in the *Gauthier* case.

Decision following Gauthier

[42] In cases following *Gauthier*, Letourneau JA referred to his reasons in *Gauthier* as setting a norm for the evaluation of the conduct of the military police in effecting arrest. He referred to these reasons while writing for the panel at the Federal Court of Appeal which awarded damages to compensate a person whose rights had been infringed by the military police. (See *Claude-Rolland M. du-Lude v. R.*, F.C.A. A-907-97, September 7, 2000).

[43] He also referred to those reasons in his analysis in the delay in bringing a matter to trial in *R. v. Larocque*, 2001 CMAC 2 at paragraph 13 and in obiter in *R. v. Lui*, 2005 CMAC 3 at paragraph 7, where he identified the duty not to arrest where the public interest may be satisfied without arresting the person.

[44] The constitutionality of section 156 of the *NDA* was never questioned in any of these decisions and never was a *Charter* violation found solely on the basis of a violation of the strict requirement of subsection 495(2) of the *Criminal Code*.

Conclusion

[45] I, therefore, reject the able submissions of the applicant to the effect that Master Corporal Hall was under a duty to comply with the requirements of subsection 495(2) in order for his arrest of Master Warrant Officer Simms to be lawful and therefore non-arbitrary. I conclude that the arrest by Master Corporal Hall was based on the power obtained under a clear legal authority which has not been proven to be unconstitutional.

[46] The question that remains, however, on the basis of *Gauthier* is whether the exercise of that power was justified in the circumstances. In light of all the circumstances here, I find that the actions taken by Master Corporal Hall were entirely reasonable. He attended the airport on the basis of a request for assistance from another police force. He ensured that he had the basis for his jurisdiction off base by confirming the persons he was going to interact with were indeed subject to the Code of Service Discipline at all times as members of the Regular Force. He relied on information relayed by the Winnipeg Police Service to form a belief that an offence of drunkenness

was committed based on an understanding of the elements of the offence which was accurate. His belief was reasonable throughout.

[47] Keeping in mind the situation where Master Corporal Hall found himself on the evening of 30 May 2014 responding to a call for assistance while on patrol, I find that his decision to arrest Master Warrant Officer Simms without warrant was justified in the circumstances. Even if he did not address his mind to the specific requirement of subsection 495(2) of the *Criminal Code* informing his belief that an arrest was required, having probably not been trained to consider these requirements as a matter of legal authority, he did substantially meet the intent of the provision. In my view, the evidence establishes that, confronted with an agitated and belligerent Master Warrant Officer Simms, Master Corporal Hall had reasonable grounds to believe that the arrest of drunkenness under section 97 of the *NDA* was necessary and that the disorderly behaviour of Master Warrant Officer Simms considering his intoxicated state would continue without effecting his arrest. Consequently, in the circumstances Master Corporal Hall may have believed on the reasonable ground that the public interest in preventing the continuation of the offence may not be satisfied without arresting Master Warrant Officer Simms.

The decision to move Master Warrant Officer Simms

[48] The applicant submits that moving Master Warrant Officer Simms from the Winnipeg Police Service cells to military police cells could do nothing to prevent the continuation or repetition of the offence of drunkenness, and in fact not only failed to prevent but provoked the commission of the offences subject to these charges, is in my view grounded in hindsight.

[49] The evidence from both Constable Ainley and Master Corporal Hall revealed that, in their non-negligible cumulative experience as peace officers, the involvement of military police in situations when a member of the Canadian Armed Forces is detained or otherwise involved with civilian police normally has the affect of de-escalating any confrontation. This makes sense. A citizen may be less prone to continue any misbehaviour when confronted by persons in authority connected with their employer. It is clear that, in this case, Master Corporal Hall was allegedly assaulted shortly after the door of Master Warrant Officer Simms' holding cell had been opened. Yet, the fact that this intervention turned out badly does not demonstrate that it was unreasonable.

[50] The applicant stressed in his submissions that Constable Ainley had testified that the Winnipeg Police Service could not let Master Warrant Officer Simms go free from the airport on his own will in the condition he was in and considering that violence was being threatened. The applicant implied that Master Corporal Hall should have concluded that Master Warrant Officer Simms should have been left alone in his holding cell at the airport where minimal damage could occur. Yet, this argument ignores the evidence of Constable Ainley to the effect that the Winnipeg Police Service holding cells at the airport are not intended to hold persons for any extended period of time, even for them to sober up.

[51] The evidence is to the effect that a person who is in the Winnipeg International Airport holding cells in an intoxicated state will be transported to what was described as a “drunk tank” at 75 Martha Street in Winnipeg. Should a person be in the holding cells for causing a disturbance and had calmed down enough to be assessed as low risk of violence, he or she will be transported to the Winnipeg Police Service Arrest Processing Unit in town. If a person in holding cells was both intoxicated and violent, arguably the case with Master Warrant Officer Simms, the person would be transferred to a provincial remand centre in town.

[52] In short, keeping Master Warrant Officer Simms in cells was not an option. A police officer was going to appear at the door of Master Warrant Officer Simms’ cell to effect his transport under police custody at one point. For the reasons mentioned earlier, it was not unreasonable for Winnipeg Police Service officers to believe that having a military police person take Master Warrant Officer Simms out of the holding cell was a reasonable course of action likely to de-escalate the situation.

[53] It is clear that all parties agree that the lawful detention of Master Warrant Officer Simms at the Winnipeg International Airport holding cells was to continue in another location throughout the night of 30 to 31 May 2014. The intervention of the military police did not alter that state of lawful and non-arbitrary detention and leads me to believe that section 9 *Charter* rights may not even have been engaged by Master Corporal Hall’s arrest of Master Warrant Officer Simms.

[54] The situation here is similar to what the British Columbia Court of Appeal dealt with in *R. v. Keeling*, [1988] B.C.J. No. 1177 where a motorist being already lawfully detained as a result of a demand to provide a breath sample was arrested for impaired driving as a result of a questionable police practice. Given that the motorist was subsequently released following processing at the same time as if he had not been formally arrested, the fact that he was arrested was deemed inconsequential. This is very much the case here too, as indeed there is no constitutional right on a person not to have his or her liberty infringed upon by the military police as opposed to civilian police.

[55] In this case, the applicant did not demonstrate that the restrictions on his liberty were any greater under military police custody than under civilian police custody. To the contrary, the facts reveal that he was treated with respect throughout by Master Corporal Hall, he was medically assessed by a medical provider who had full access to his medical files and was released and driven to the Winnipeg International Airport on time to continue his vacation with no more delays as was incurred allegedly through his own behaviour.

Conclusion

[56] This lack of adverse consequences of the military police intervention on the applicant reinforces my belief that section 9 *Charter* rights were not infringed. Even if I

had accepted the argument of the applicant to the effect that subsection 495(2) of the *Criminal Code* imposes a strict requirement on military police which was not met by Master Corporal Hall, the remedy that would have been appropriate to address this violation could not possibly be a stay of proceedings on the facts of this case.

[57] In coming to that observation, I very much take into account the fact that on the late evening on 30 May or early hours of 31 May 2014, a peace officer had to enter the holding cell of Master Warrant Officer Simms to transport him under police control to another location.

[58] Society's interests in ensuring that a trial takes place to address the alleged assault when a peace officer entered that holding cell and that a final decision be made on the merits will, in my view, far outweigh any interest served by granting of a stay of proceedings.

FOR THESE REASONS, THE COURT:

[59] **FINDS** that the applicant has not met its burden of demonstrating a violation of his section 9 *Charter* rights in the circumstances of this case. Consequently, no remedy is required and this application for a stay of proceedings is dismissed.

Counsel:

The Director of Military Prosecutions as represented by Major D. Martin and Captain C.S. Nam

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Warrant Officer A.W. Simms