COURT MARTIAL

Citation: *R. v. Stewart*, 2021 CM 5006

Date: 20210514
Docket: 202025
Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Sailor 3rd Class J.G. Stewart, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander C.J. Deschênes, M.J.

RESTRICTION ON PUBLICATION

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as "A.R.", shall not be published in any document or broadcast or transmitted in any way.

DECISION RESPECTING AN APPLICATION UNDER SUBSECTION 24(1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ALLEGED VIOLATION OF SECTION 7 AND PARAGRAPH 11(*d*) OF THE *CHARTER*.

(Orally)

Introduction

[1] The applicant, Sailor 3rd Class Stewart, is facing two charges of sexual assault contrary to section 271 of the *Criminal Code* and laid pursuant to section 130 of the *National Defence Act* (*NDA*). By virtue of his notice of application dated 2 May 2021, he seeks an order to stay the proceedings of both charges under subsection 24(1) of the

Canadian Charter of Rights and Freedoms. He alleges that his right to make full answer and defence has been breached by the loss, destruction and failure to preserve evidence by the Crown, evidence that was collected, or should have been collected, by the complainant's chain of command (CoC) before the matter was referred to the military police.

Position of the applicant

[2] In particular, the applicant alleges that the complainant first brought her allegations of sexual assault to several members of her CoC during two separate meetings on the morning of 13 August 2018 before being interviewed by the military police later that morning. No records of these two meetings were disclosed by the prosecution to the defence. However, it is alleged that the complainant did write a statement for her captain or major. The applicant alleges that the statement was not disclosed, and is therefore most likely lost. He also contends that the unit had a duty to collect and provide this information, a contention that is confirmed by the actions of the Regimental Sergeant Major (RSM) of the unit who took the initiative to provide to the military police relevant information in the possession and control of the unit. The loss of the complainant's written statement, which is relevant evidence to his defence, as well as the CoC's omission to take notes during the meetings that took place with the complainant, constitute a violation by the prosecution of its obligation to disclose all relevant evidence under section 7 of the *Charter*. The applicant submits that the prosecution's violation of its duty to disclose, and the manner in which the violation occurred where no reasonable steps were taken to preserve the evidence, affected his right to make full answer and defence.

[3] He claims his case is one of the rarest cases where there is an absence of any alternative remedy that would cure the prejudice and where irreparable prejudice to the integrity of the judicial system would occur if the prosecution is continued. The applicant further contends that this justifies the exercise of the Court's discretion in favour of the extraordinary remedy of a judicial stay of proceedings in accordance with subsection 24(1) of the *Charter*. The applicant relied heavily on the case of *R. v. Carosella,* [1997] 1 S.C.R. 80, where the Supreme Court of Canada (SCC) ruled on an appeal regarding the intentional destruction of a detailed account given by the complainant in 1992 about a historical sexual assault, where allegations dated back to 1964 when the complainant was a child. Relying on the principles established in *R. v. Stinchcombe,* [1991] 3 S.C.R. 326, the SCC allowed *Carosella's* appeal and determined that the accused's *Charter* rights had been breached.

Position of the respondent

[4] The respondent, on the other end, contends that full disclosure, which includes records of the interviews involving the complainant, was provided in June 2020. There is no evidence of the content of the alleged written statement nor whether it contained a detailed version of events since the complainant does not remember making a written statement. There is no indication that the complainant provided inconsistent statements.

This written statement, if it existed, would have very little value to the defence. Any prejudice that may have arisen as a result of the absence of records in this regard is vitiated because the complainant did provide a pure and detailed statement to the military police afterwards and because the complainant will be made available for cross-examination by the defence at the trial.

[5] The respondent also asserts that reasonable steps were nevertheless taken to locate any written statement the complainant may have provided to her CoC but none could be found. The failure to create or locate the written statement constitutes a simple mistake. Furthermore, pursuant to DAOD 9005-1, Sexual Misconduct Response, the CoC is not the proper authority to receive reports of sexual misconduct since it is also not mandated to investigate allegations of sexual misconduct. Regardless, the CoC has turned over to the investigator all records in its possession. If it had the records the defence is seeking, the CoC would have provided them. Alternatively, the prosecution contends that should the Court find that there was a breach of the accused's rights to receive full disclosure, there is no evidence that his right to make full answer and defence has been impacted. Should the Court come to the contrary conclusion, the prosecution contends that a stay is not the proper remedy; the prejudice, if any, should be assessed after the presentation of the evidence at the trial in order to determine the appropriate remedy.

The facts

[6] At the hearing held in Asticou Centre, Gatineau, Quebec on 10 May 2021, counsel provided an Agreed Statement of Facts (ASOF), which can be summarized as follows: At the time of the offence, both the complainant and the accused were regular force members serving at the Canadian Forces School of Communications and Electronics (CFSCE). On 13 August 2018, the complainant reported to her superiors during two separate and consecutive meetings the alleged offences that would have occurred on 9 August 2018. As a result of her complaint, she was escorted shortly thereafter to the Kingston Military Police Detachment Unit where, at 1035 hours, she was interviewed by Corporal Ian Dunn of the military police. The interview was video recorded. The prosecution had a transcript prepared by StenoTran Services Inc. During her interview, while describing the commission of the alleged offences, the complainant stated, "I didn't mention that when I spoke to my captain or my major this morning because I hadn't really thought about it, to be entirely honest." Later towards the end of the interview, the following exchange took place between the complainant and Corporal Dunn, when the latter asked her if she was willing to write a pure version statement, which would be essentially in her own words from beginning to end:

> "[Complainant]: I already gave a witness statement for my chain of command.
>
> Corporal Dunn: Did you?
>
> [Complainant]: Does that work?

> Corporal Dunn: Yes, however, I do have paper here and if
>
> [Complainant]: Oh, I can fill that out, too, that's fine.
>
> Corporal Dunn: Okay. Fantastic.
>
> [Complainant]: Yeah. Because my witness statement, I didn't write about him hitting me.
>
> Corporal Dunn: Yeah.
>
> [Complainant]: I hadn't even thought about it."
> [Emphasis removed.]

[7] The following day, the complainant was also interviewed by investigators of the Canadian Forces National Investigation Service (CFNIS).

[8] On 10 June 2020, the applicant was disclosed evidence in the possession or control of the military prosecution, including the 13 August 2018 military police interview. The evidence disclosed on that date reveals that the complainant is the only witness to the alleged serious offences apart from the applicant.

[9] On 13 April 2021, no written statement made by the complainant to her CoC had been disclosed to the applicant, nor was any account of the discussions that the complainant had with her captain or with her major or any other members of her CoC regarding her allegations. The applicant did not receive disclosure of the name or contact information of the complainant's captain or major. After noticing the missing information from the disclosure, the applicant requested disclosure of the written statement that would have been prepared by the complainant, along with any notes of the meeting that took place between the complainant and her captain and major, regarding the alleged offences.

[10] Following a request for an update on the progress made to obtain the records on 25 April 2021, the prosecution disclosed on 29 April 2021 that, before speaking with the military police on 13 August 2018, the complainant reported the alleged offences verbally to Sergeant Hammond and Master Corporal Noel, who brought the complainant to see Master Warrant Officer Campbell, Major Stites and Captain Anderson. The complainant recounted verbally the events to Master Warrant Officer Campbell, Major Stites and Captain Anderson. At their suggestion, she reported the incident to the military police the same morning. The complainant also reported the alleged offences to Warrant Officer Hill and Captain Pyadowsky at an unknown time. No accounts, notes or records of any of these conversations with the complainant regarding the alleged offences were created at the time.

[11] Amongst the disclosure was also evidence gathered by Chief Warrant Officer Levac, the RSM of the CFSCE. Chief Warrant Officer Levac took the initiative to provide to the military police the following evidence in the possession and control of the

unit: a written statement by Private Lévesque obtained on 13 August 2018 by Chief Warrant Officer Levac; a second written statement by Private Lévesque, obtained on the next day by Chief Warrant Officer Levac; text messages between Private Lévesque and the applicant obtained on 14 August 2018 by Chief Warrant Officer Levac; and text messages dated 12 August 2018 between the complainant and the accused. Private Lévesque is a potential witness who may be called to testify solely on the circumstances surrounding the alleged offences.

[12] A supplemental disclosure provided to the applicant on 3 May 2021 regarding the written and verbal statements made by the complainant to her CoC revealed that the complainant does not recall providing a written statement to her CoC. It also revealed that Major Stites recalls the complainant verbally reporting the incident to him and Master Warrant Officer Campbell but he did not provide any account nor was he questioned by the military police on what was said. Captain Anderson and Warrant Officer Hill have not located nor recall collecting any written statement provided by the complainant to her CoC. Sergeant Hammond, Master Corporal Noel and Captain Pyadowsky were not questioned by the military police regarding the location of any written statement provided by the complainant to her CoC, nor were they questioned regarding their recollection of the verbal statement of the complainant. Master Warrant Officer Campbell was personally unable to access his email archives to confirm if it contained a written statement of the complainant. The military police took no steps to enable Master Warrant Officer Campbell to access his electronic archive.

The issue

[13] The issue turns on the omission of members of the CoC to create records of the meetings that took place with the complainant regarding the allegations, particularly meetings held on 13 August 2018 and their failure to preserve a written statement of the complainant allegedly provided on that date. Does this omission of the CoC constitute a breach of the applicant's section 7 *Charter* rights? If the appellant's *Charter* rights were breached, is a stay based on subsection 24(1) the appropriate remedy?

The evidence adduced at hearing

[14] The applicant's notice of application dated 2 May 2021, the respondent's response dated 7 May 2021 and the ASOF were the only evidence provided in support of the application. No copies of the complainant's statements to the military police, and to the CFNIS, and no will-say was provided. The evidence provided by Chief Warrant Officer Levac, which was referred to in the ASOF as being of "notable importance" was also not provided. The evidence was sparse, to say the least.

The analysis

Constitutional right to receive full disclosure

[15] An analysis of an application relating to a breach of this *Charter* right for not providing full disclosure involves a three-step process: first, whether there was a breach of disclosure; second, if there was a breach of disclosure, whether there was a violation of the right to make full answer and defence; and finally, if there was such a violation, the appropriate remedy that the court should impose.

[16] The right to full disclosure is entrenched in the *Charter* at section 7 which provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[17] In 1991, the SCC confirmed in *Stinchcombe* that the common law right of an accused to receive full disclosure of evidence was a guarantee included in section 7 of the *Charter* as one of the principles of fundamental justice. Failure to disclose relevant evidence would likely impede the ability of the accused to make full answer and defence. The SCC also recognized in *Stinchcombe* that the Canadian criminal justice system was in dire need of uniform and comprehensive rules for disclosure by the Crown, including the timing it should take place and the scope of the disclosure. This decision was rendered at a time when disclosure was being made by the Crown on a voluntary basis, and the extent of disclosure varies from jurisdiction to jurisdiction. The SCC established that all relevant evidence, including exculpatory evidence must be disclosed to the defence even if the prosecution does not intend to adduce it at trial. However, the obligation of the Crown to disclose is not absolute as it suffers from some exceptions. The Crown has a duty to respect the rules of privileges, for example, to protect the identity of an informer, and must therefore withhold this information. This discretion to withhold evidence also applies obviously to evidence that is beyond the control of the prosecution, or is clearly irrelevant.

[18] The exercise of this prosecutorial discretion to withhold certain elements is reviewable by the trial judge. The SCC went on to add at page 341:

> Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

[19] The SCC also established later in its decision in *R. v. Chaplin*, [1995] 1 S.C.R. 727:

> Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified not only to reveal its nature but also

> to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce as set out above in the passages which I have quoted from *R. v. Stinchcombe* and *R. v. Egger*, *supra*.
>
> . . .
>
> [32] Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests.

[20] It is trite to say there is no obligation on the prosecution to disclose or produce records it does not have, although there is an ongoing obligation imposed on the prosecution to disclose, and it must disclose any new information or material to the defence as soon as possession or control of the records is obtained. The obligation to disclose exists whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence.

[21] Essentially, as established in the decision of the SCC in *R. v. La*, [1997] 2 S.C.R. 680, at paragraphs 16 to 22, if evidence has been lost because of the prosecution's actions, then it puts on the prosecution the burden to provide an explanation for such situation, and if the trial judge is satisfied, then he may conclude that the duty to disclose has not been breached.

Right to make full answer and defence

[22] As expressed in *R. v. Dixon* [1998], 1 S.C.R. 244, the defendant must demonstrate a reasonable possibility that the undisclosed information could be, or could have been, used in meeting the case for the prosecution by advancing a defence or otherwise making a decision which could affect the conduct of the defence. Should the court find that the accused's right to make full answer and defence has been breached, then the court must determine the appropriate remedy in the circumstances.

[23] The determination of whether the accused's right to receive full disclosure has been breached requires a contextual analysis. In the case at bar, there are two aspects of the applicant's submissions: first, the omission of the complainant's CoC to record, in writing, the substance of the meetings that took place between them and the complainant, particularly on 13 August 2018 as they pertained to the allegations; and second, the complainant's statement allegedly prepared for the CoC on the same date, which was not provided to the military police, who interviewed the complainant about the allegations. It is agreed that the contentious records were never provided to the prosecution. Regardless, the allegations do not pertain to the prosecution intentionally withholding or destroying evidence.

Absence of records of meetings with the complainant

[24] It is common knowledge that the preparation of witnesses' statements involving video or audio-recording or in writing constitutes a standard investigatory tool,

particularly when the witness is a complainant of sexual misconduct, as he or she would typically be a key witness, and often the only witness, thus the only evidence to prove the allegations as part of the Crown's case. In the particular context of investigations conducted within the military justice system, the CoC has the authority to conduct investigations (see Note B to article 106.02 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O)). Additionally, in accordance with article 107.02 of the QR&O, the commanding officer, an officer or non-commissioned member authorized by a commanding officer to lay charges or a member of the military police assigned to investigative duties with the CFNIS may lay charges under the Code of Service Discipline.

[25] As part of this dual role within the military justice system, being its leadership role and investigative role, the involvement of the CoC may seem blurry, in particular when its members receive allegations of misconduct. The measures that they took at the time they received the allegations will be determinative as to whether they were acting in an investigatory role, or whether they were simply exercising their leadership role.

[26] In the case at bar, the evidence shows that members of the CoC did receive the complainant's allegations on the morning of 13 August 2018 during two impromptu meetings. The evidence also shows, however, that these members did not take an investigative role in dealing with the matter. Rather, in performing their leadership role, Sergeant Hammond and Master Corporal Noel listened to the complainant's allegations. They then brought her to meet superiors higher in the CoC: Major Stites, Captain Anderson and a senior non-commissioned officer (NCO). The complainant then recounted her version of events to them as well. They listened to her, then recommended that she report her allegations to the military police. Upon the complainant agreeing to this recommendation, they immediately provided her with an escort to accompany her to the military police detachment.

[27] It is clear from this evidence that these members of the CoC understood they were exercising their leadership role that morning when they met the complainant, a subordinate. They provided the required support by listening to her, recommending that she report to the appropriate organization, and providing her with an escort once she agreed to follow the recommended course of action. In recommending that she make a formal complaint to the military police, they understood that these allegations should be investigated by trained members; in other words, by those appointed as members of the military police under regulations, in accordance with the authority provided at section 156 of the *NDA*. As these members of the CoC were not fulfilling an investigative role when they met the complainant on the morning of 13 August 2018 they were under no obligation to record neither the nature nor the substance of their meetings with her. Imposing the obligation on members of the CoC to keep a record of every single meeting they have with subordinates, particularly when the meeting is impromptu, would constitute an unnecessary and unattainable standard. The role and independence of the military police, and the leadership role of the CoC in ensuring the well-being of its members, have been recognized by the Court Martial Appeal Court in *R. v. Wellwood*, 2017 CMAC 4.

[28] Regardless of their role when meeting with the complainant in regard to her allegations, the SCC has recognized in *Stinchcombe* that records are not always created in all cases during investigations, regardless of the nature of the offence. Writing for the Court, Sopinka J. stated at page 345:

> I am of the opinion that, subject to the discretion to which I have referred above [referring to the discretion of the Crown to withhold evidence], all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied.

[29] In the absence of written records, the SCC has clearly established that the name, address and occupation of the witness(es), whether they will be called to testify at the trial or not, should be provided to the defence. In this case, no records of the meeting were created, therefore the evidence never existed. When the applicant informed the prosecution of the possible existence of a statement and of his concerns pertaining to the absence of records, and sought to obtain the contended information, the prosecution made all reasonable and necessary inquiries to investigate this specific issue, as demonstrated by the ASOF. The prosecution did provide at the earliest opportunity, in fact in a matter of days, the names and contact information of the members of the CoC the complainant met to discuss the allegations. It also provided additional information it received from members of the CoC regarding their involvement and recollection of their meetings with the complainant the morning of 13 August 2018.

[30] I therefore find that the omission of members of the CoC to record in writing the substance of their meetings with the complainant does not constitute a breach of the applicant's section 7 *Charter* right.

The complainant's alleged statement prepared at the request of her CoC

[31] As for the complainant's statement during the meeting with members of her CoC, I must first ask myself whether the applicant has demonstrated on a balance of probabilities that a written statement was prepared for her CoC. If it did, this evidence would not have formed part, in any event, of the prosecution's evidence to be adduced at the trial. Rather, this evidence could present a defence's avenue to impeach the credibility of the complainant's testimony, should the written statement, if it existed, be inconsistent with the one provided to the military police later that morning.

[32] Based on the ASOF provided in support of this application, the evidence establishes that although it may have been relevant to the defence's case, in light of the reasonable steps taken by the prosecution to shed light on this issue before the hearing of the application once the applicant raised his concern a few days before the scheduled date of the trial, I find that the applicant has failed to demonstrate, on a balance of

probabilities, that the statement of the complainant to members of her CoC provided the morning of 13 August 2018 was transcribed.

[33] Indeed, during her interview with the investigator which started at 1035 hours on 13 August 2018, the complainant explained having verbally provided her allegations to her CoC when she says she did not mention something in her conversation with the captain or the major. Then she says she gave a witness statement to her CoC without specifying if the statement was in writing. When asked by the investigator if she could provide him with a statement in written form, she answers that she could "fill that out, too". The only indication in the entirety of the evidence admitted in support of this application that a statement in a written form may have been prepared for her CoC is when the complainant tells the investigator, "[B]ecause my witness statement, I didn't write about him hitting me." The contention in support of the application rests with this specific excerpt of her interview with the military police, but, of course, put into its context as referred to earlier.

[34] A review of the evidence pertaining to what unfolded before her interview with the military police is critical in this context. This evidence admitted through the ASOF shows that the time when the complainant gave her statement to her superiors to when she was interviewed by the military police was brief. The complainant arrived at her unit the morning of 13 August 2018. The precise time is unknown. Sometime following her arrival, she sought a meeting with two of her superiors, Sergeant Hammond and Master Corporal Noel. During this meeting, she reported to them allegations of sexual assault that would have taken place just a few days before. Sergeant Hammond and Master Corporal Noel, shortly thereafter, had a meeting with the complainant and a major, a captain and a senior NCO all at the same time. The complainant then relayed her allegations to the group. Following this second meeting, the complainant's superiors assigned an escort to accompany her to the military police detachment. She presumably left the unit's line with the CAF member escorting her and went to the military police detachment where her interview commenced at 1035 hours that same morning. It is therefore difficult to conclude in these circumstances that the complainant would have been asked, and had an opportunity, to provide any written statement in this brief period of time.

[35] Furthermore, the evidence established that the complainant verbally recounted the events to the major, the captain and the senior NCO. At their suggestion, she agreed to report, and did in fact report, the allegations to the military police a short moment later. It would be illogical in these circumstances to ask the complainant to write a witness statement, knowing that she was leaving immediately to make a formal complaint to the military police. Further, the evidence before the Court demonstrates that no accounts, notes or records of any of these conversations with the complainant regarding the alleged offences were created at the time. All of those involved either confirmed that such a record was not created when they met the complainant, or they did not remember a written statement being prepared. Those who stated they could not remember still proceeded to verify if they could locate a written statement once queried by the prosecution, but were unsuccessful. In particular, during her interview with the military

police, the complainant was alluding to “not writing about being hit” when providing her allegations at the second meeting, when she said, “I did not mention this when I spoke with the captain or major.” When the prosecution sought clarification in this regard, Major Stites reported that he remembers only receiving her allegations verbally, whereas Captain Anderson and the senior NCO do not recall collecting any written statement.

[36] Also, the complainant, herself, was candid about her omission to provide certain details of the allegations and, on her own volition, admitted that her initial verbal statement to members of her CoC was not detailed when she said, “I didn't mention that when I spoke to my captain or my major this morning because I hadn't really thought about it, to be entirely honest” and later, “I didn't write about him hitting me […] I hadn't even thought about it.” These statements confirm the conclusion that the brevity of time between her reporting the allegations twice to her CoC and the interview with the military police did not sufficiently allow her time to collect her thoughts in order to provide a fulsome account of the event prior to her interview with the military police. She was also forthcoming and candid in pointing out, without being prompted, that the first version she gave to her CoC, moments before, was incomplete.

Applicant’s submissions

[37] I find the case at bar easily distinguishable from the *Carosella* case. This SCC case is particularly interesting because the Court was divided on the issue, with a majority of five, and four dissenting. The majority ruled that the destruction of the complainant’s first detailed account of the allegations which were provided during a lengthy meeting with a social worker from the Sexual Assault Crisis Centre (the Centre) violated the accused’s right to make full answer and defence and constituted, in the circumstances of the case, an abuse of process. The Centre was a publicly funded organization. The notes taken during the interview with the complainant had been destroyed pursuant to the centre’s policy of shredding files with police involvement in order to defeat the processes of the court for production of documents. The purpose of the policy intended to reduce further victimization to the clients it served. The social worker confirmed the existence of the notes and their destruction but had no recollection of the content of the ten pages of notes she destroyed. The SCC also noted in this case that the complainant would not admit to rendering inconsistent statements.

[38] Unlike the *Carosella* case, not only is there no evidence of willful destruction of evidence, I found that, on a balance of probabilities, no records were created in the first place. At no time on or after 13 August 2018 does the complainant expressly or clearly state that she did write a statement. Her answers to the military police during her interview only vaguely and collaterally allude to the possible existence of a written statement. As mentioned earlier, all the members of her CoC involved in receiving her complaint either confirm the statement was provided verbally, or cannot remember. Additionally, the complainant also disclosed, on her own, that her initial complaint to the captain or major was incomplete; she provided the specific omissions and explained why there were omissions.

[39] As for the argument that the RSM proactively provided the evidence in the possession of the unit, I lent little credence to this submission. Firstly, I was not provided with the nature nor the substance of the evidence that was gathered by Chief Warrant Officer Levac, evidence that was described in the ASOF as being of "notable importance", without any factual basis supporting this assertion. I do not know in what capacity Chief Warrant Officer Levac was operating, whether he was conducting a unit investigation or whether he collected this evidence on his own initiative. Consequently, I am unable to draw a conclusion regarding this evidence, except that it does demonstrate that the unit was cognizant of its obligation to provide all relevant information related to the allegations that it had in its possession, and clearly did so. Had the unit been in possession of a written statement from the complainant, it is apparent that the unit understood it needed to disclose it and would have done so, as did Chief Warrant Officer Levac regarding the information he had in his possession.

[40] In summary, the complainant had two separate meetings with at least five members of her CoC, all in a matter of a very short period of time before her interview with the military police commenced at 1035 hours, to report a sexual assault that allegedly happened just days before. None of the members of her CoC confirm the existence of a written statement. On the contrary, Major Stites remembers only receiving a verbal statement. I conclude therefore that the applicant failed to prove, on a balance of probabilities, that the prosecution lost, destroyed or failed to preserve relevant evidence. The alleged written statement from the complainant to her CoC was never created, as I find that the complainant only provided her statement verbally to her CoC during this short period of time that preceded her interview with the military police. In fact, the vagueness of her comment to the investigator in this regard is the sole, unclear and ambiguous indication of the mere possibility that a written statement may have been prepared. The evidence provided in support of the application does not demonstrate, on a balance of probabilities, that relevant evidence existed and was later lost or destroyed.

No obligation to explore all possible defences

[41] On this note, courts have recognized that the obligation of the Crown to provide disclosure does not include an obligation to explore every possible defence and collect relevant evidence in this regard. See, for example, *R. v. Witharanage*, 2019 QCCA 1679 at paragraphs 20 to 23. See also the dissent in *Carosella* at paragraph 66 where L'Heureux-Dubé J. wrote, "This duty to disclose does not extend to third parties. Nor does it impose an obligation upon the Crown to comb the world for information which might be of possible relevance to the defence" [emphasis removed]. Since the applicant alleges in his application that the omission to record the substance of the meetings with the complainant prevents him from exploring ways to impeach the complainant's testimony, in the specific circumstances of this case that I have highlighted, it falls on him to contact the members of the CoC who received the allegation, in order to determine if they have information that could assist the defence in impeaching the complainant's testimony. The defence is able to get an account of what happened during the two meetings with the complainant, through the testimony of all witnesses present. He can call as witnesses members of the CoC who met the complainant. The defence will also

have an opportunity to cross-examine the prosecution's witnesses, including the complainant.

Obligation of counsel in pursuing disclosure

[42] It is quite unfortunate that the prosecution had in its possession since 2018 the transcript of the interview of the complainant with the military police that took place on 13 August 2018, and did not make any inquiry to confirm that no records existed until being prompted by the defence in April 2021. Also unfortunate is that the defence received this information as part of the disclosure on 20 June 2020, however, did not query the prosecution until a few weeks before the trial was scheduled to start. Although I have found that the applicant failed to prove that relevant evidence was lost, the lack of due diligence is a significant factor in determining whether the non-disclosure affected the fairness of the trial process. Counsel who becomes or ought to have become aware of material that has been disclosed or a failure to disclose further material must not remain passive, but diligently pursue disclosure. In this case, it is difficult in the circumstances to conclude that both parties continually pursued disclosure in the past ten months, when counsel took steps to seek and obtain clarity on these records at the eleventh hour. This has caused unnecessary delays for the start of the trial.

Conclusion

[43] With the evidence that was admitted in support of this application, I find that the applicant's right guaranteed under section 7 of the *Charter,* as it relates to his right to receive full disclosure, has not been infringed. The prosecution disclosed all relevant evidence in its possession. The applicant failed to show, on a balance of probabilities, that the prosecution did lose, destroy or failed to preserve relevant evidence.

FOR THESE REASONS, THE COURT:

[44] **CONCLUDES** that the prosecution did not breach its duty to disclose, as it pertains to the meetings that took place between the complainant and members of her CoC; and

[45] **DISMISSES** the application.

Counsel:

Major A. Gélinas-Proulx, Defence Counsel Services, Applicant and Counsel for Sailor 3rd Class J.G. Stewart

The Director of Military Prosecutions as represented by Major C. Walsh and Major A. Dhillon, Prosecutors and Respondent