COURT MARTIAL

Citation: *R. v. McGown*, 2022 CM 4011

Date: 20220629
Docket: 202058

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Private C.J. McGown, Applicant

- and -

Her Majesty the Queen, Respondent

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

Restriction on Publication: Pursuant to section 179 of the *National Defence Act*, the Court orders pursuant to section 486.4 of the *Criminal Code* that any information that could identify the person described during these proceedings as the complainant, shall not be published in any document or broadcast or transmitted in any way, except when disclosure of such information is necessary in the course of the administration of justice and when it is not the purpose of that disclosure to make the information known in the community.

DECISION AS TO WHETHER A STATEMENT GIVEN TO MILITARY POLICE BY THE ACCUSED SHOULD BE ADMITTED IN EVIDENCE

(Orally)

[1] Private McGown has pleaded not guilty to the one remaining charge on the charge sheet, laid under section 130 of the *National Defence Act* (*NDA*), for sexual assault contrary to section 271 of the *Criminal Code*. It is alleged that on or about 9 November 2019, when he was undergoing basic military training at the Canadian Forces Leadership and Recruit School (CFLRS) in Saint-Jean-sur-Richelieu, Quebec, he sexually assaulted N.W., a colleague on the course. Private McGown was arrested by military police (MP) shortly after the alleged assault would have taken place, detained for over twenty hours, during which time he was interrogated by a MP investigator from

the Canadian Forces National Investigation Service (CFNIS) and subsequently released by a Custody Review Officer on a number of conditions. Private McGown was posted from CFLRS to Borden, Ontario in February 2020, and left the Canadian Armed Forces (CAF) in November 2020. He now lives in Comox, British Columbia and has driven to Halifax, Nova Scotia for the proceedings of his General Court Martial.

[2] At the opening of the proceedings, I confirmed the receipt of a notice of application by the defence, dated 17 December 2021, alleging that the rights of the accused to retain and instruct counsel under paragraph 10(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*) have been infringed in the course of his arrest and subsequent detention and interrogation by the MP. As a remedy for the alleged violation, the defence requests that the statement given by Private McGown, be ruled inadmissible as evidence in the trial, given that, having regard to all the circumstances, its admission in the proceedings would bring the administration of justice into disrepute.

[3] Unsurprisingly, in light of its application, the defence is not ready to admit that the statement by Private McGown to the MP was made voluntarily. This is significant in this case because, in the course of pre-trial case management conferences, the prosecution mentioned that it will seek to have this statement admitted as part of its case against the accused.

[4] Given these circumstances, discussions were held with counsel in order to establish the most effective way to deal with the required hearing or hearings to enable the Court to be in a position to arrive at a determination on both the defence application and the issue of voluntariness of the statement given by the accused to the MP. In the exercise of its case management power, the Court has directed, with the consent of counsel, that a hearing be held immediately following the plea of the accused, in the form of a blended *voir dire*. The intent of such a procedure is to allow the evidence of the prosecution to be presented to establish the voluntariness of the statement given by Private McGown to the MP on 10 and 11 November 2019, at the same time allowing the defence to cross-examine any of the MP witnesses, including for the purpose of supporting the defence's application. In turn, the defence was given the opportunity to call evidence in support of its application and the prosecution was able to test that evidence by cross-examination as required.

[5] The blended *voir dire* was opened immediately following the not guilty plea by the accused on Monday, 9 May 2022. Five witnesses were heard over four days, including the accused who testified as the sole witness for the defence. A number of documents were entered as exhibits, including audio-video recordings of the accused through the process of arrest, detention, interrogation and release; legal rights and cautions forms used by police throughout; transcript of the accused's interrogation by the MP investigator; the forms mandated in regulations used in relation to Private McGown's custody, namely the Account in Writing, Report of Custody and Direction on Release from Custody; and an Agreed Statement of Facts. Once satisfied that all of the evidence was presented, the parties argued their respective positions on both the

voluntariness and the *Charter* violation issue on Friday 13 May 2022. The Court reserved its decision on the admissibility of the statement.

[6] This is the expected decision and the reasons supporting it.

[7] Given that the panel of the General Court Martial (GCM) is scheduled to assemble to try the accused on 25 July 2022, I hereby order, under the authority conferred to me by section 179 of the *NDA*, that the content of these reasons not be published, broadcast or transmitted in any way between now and the time that the members of the panel return their verdict on the charge in the course of the proceedings of the GCM. This order does not apply to the disclosure of such information in the course of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community.

The questions to be determined

[8] Although the finality for the efforts of both parties in producing evidence and arguments is centered on the fundamental question of whether the statement given by Private McGown to the MP should be admitted or not, the legal analysis required to assess the position of both parties is entirely different.

[9] First, when the prosecution wishes to enter in evidence, as part of its case, a statement made by an accused to a person in authority such as a police investigator, it must prove the voluntariness of the statement beyond a reasonable doubt. That is therefore the first question to be determined.

[10] If the prosecution has met its burden of proving the voluntariness of the statement beyond a reasonable doubt, I will then need to turn to the application by the defence and determine whether the alleged *Charter* violation has been demonstrated, on the balance of probabilities. I will then assess what the remedy should be for any violation found.

The facts

[11] A substantial body of information was received in the course of a rather lengthy blended *voir dire*. I accept the following narrative as constituting the factual background which I will relate for the most part chronologically for ease of understanding. I will elaborate on certain aspects of this factual background later in my analysis, as required.

The arrest and legal rights (first caution)

[12] Private McGown was arrested at 0415 hours on 10 November 2019 as he was asleep in his room at CFLRS. The arrest resulted from a call made to the MP in garrison Saint-Jean-sur-Richelieu at 0200 hours by CFLRS personnel pertaining to an alleged sexual assault. The MP member in charge (IC) of the shift, known as the shift IC, was

Sergeant Godin. He attended CFLRS himself, along with Corporal Lovell, arriving at around 0211 hours.

[13] Private McGown was taken out of the massive CFLRS building, named "The Mega" at 0435 hours. He was searched and handcuffed. Nothing was found on him. He was placed in a patrol vehicle which then left for the short drive to the MP detachment on garrison Saint-Jean-sur-Richelieu. About a minute later, while underway, Sergeant Godin read the legal rights from the MP notebook (CF 1386), using what he qualified as a *Criminal Code* caution as opposed to a Code of Service Discipline caution. There was one negative answer initially given by Private McGown to the question of whether he understood the warning about his right to remain silent, as worded in the "Non-Specific Charge" caution in the CF 1386. After a second reading, Private McGown signaled affirmatively that he understood his legal rights. It is worth noting that Sergeant Godin stumbled when giving Private McGown his right to counsel. He initially read the right to counsel from the MP notebook but was reminded by Corporal Lovell to read the right to counsel from what was described as a "Quebec Card", introduced as Exhibit VD1-3. Sergeant Godin read the right to counsel from the "Quebec Card" once reminded. Sergeant Godin did not explain to Private McGown that he could obtain free legal advice from a military lawyer from the Director of Defence Counsel Services (DDCS). Private McGown requested to speak to a lawyer at 0438 hours, while still in the police vehicle.

The consultation with counsel

[14] Upon arriving at the MP detachment, Private McGown was placed in what was described as the "Solicitor-Counsel room". Sergeant Godin dialed the number for a provincial civilian legal aid service and spoke to a lawyer on call there. Unfortunately, that person did not speak English and was therefore unable to be connected with Private McGown. Sergeant Godin was then in contact with a local counsel, Mr. Robillard, who was put into contact with Private McGown in the privacy of the "Solicitor-Counsel room". At one point during the consultation, at about 0500 hours, Mr. Robillard requested to speak with Sergeant Godin to inquire about the police intentions for Private McGown, essentially asking whether Private McGown would be charged. Sergeant Godin could not recall his exact answer to the lawyer's question but recalls telling him that the investigation was ongoing. Sergeant Godin knew, at the time, that he would need to engage investigators from the CFNIS. At 0503 hours, Private McGown indicated to Sergeant Godin that his call was completed. He did not express any dissatisfaction with the advice he had received. It is worth noting that at no point did Sergeant Godin envisage dialing the phone number for the DDCS, which he had in his possession. He explained in cross-examination that not knowing where the case would end up, he chose to give the information relating to civilian legal aid services, as he was dealing with a sexual assault allegation, an offence under the *Criminal Code*.

The detention in the interview room

[15] Immediately after dealing with the consultation by Private McGown with counsel, Sergeant Godin spoke to the MP duty officer, an outside resource available to him for advice and liaison, between approximately 0505 and 0515 hours. It was Sergeant Godin's understanding following this conversation that the MP duty office would liaise with the CFNIS, who were then expected to send investigators and take over the investigation.

[16] While Sergeant Godin was speaking to the MP duty officer, Corporal Lovell was dealing with Private McGown. The Account in Writing produced as exhibit VD1-2, authored by Corporal Lovell, reveals that at 0510 hours, Corporal Lovell determined that Private McGown should be retained in custody, a time which Corporal Lovell testified would be accurate.

[17] However, in his testimony, Corporal Lovell was very much in doubt about the next timing in that document, indicating that at 0515 hours, he delivered the Account in Writing to Sergeant Godin, the non-commissioned member into whose custody the person under arrest was being committed as IC of the guardroom. Indeed, the required explanations as to why Private McGown should be retained in custody refer to a CFNIS interview which took place over thirteen hours later and a decision about Private McGown's intended place of residence upon release, made over nineteen hours later. This casts doubt about whether, and at what time, the Account in Writing was delivered to Sergeant Godin. In addition, Corporal Lovell was unable to state whether Private McGown was formally told he would be retained in custody and when, despite the requirement stipulated at *Queen's Regulations and Orders for the Canadian Forces (*QR&O), paragraph 105.12(2) at the time, now at QR&O article 105.121. No evidence was heard establishing whether Private McGown was told the name and rank of the person who ordered his retention in custody, nor whether he was given a copy of the Account in Writing, as required at QR&O paragraph105.16(2). In fact, the audio-video recording of Private McGown's interview with the CFNIS reveals that the Account in Writing would, in all likelihood, have been given to him only past midnight on 11 November, when he was about to be released from custody.

[18] In any event, it appears well settled that at about 0510 hours, Private McGown was placed in an interview room, specifically room 111 at the MP detachment on garrison Saint-Jean-sur-Richelieu. As the name implies, this is a room equipped with chairs and a table for the purpose of interviews in the course of MP investigations. It has video and audio recording equipment for that purpose. It is not a cell as it has no bed or cot or sanitary facilities. Yet, operational cells were available a few meters away at that MP detachment. Private McGown would stay in the interview room for almost six hours. When he was placed in that room by Corporal Lovell, he was not told there were other options for his detention or that he was video recorded while in the interview room. In the examination-in-chief, Corporal Lovell said he could supervise Private McGown in the interview room from a window in the room next door, but in cross-examination could not recall if he had checked on him.

[19] At the same time, over 250 kilometres away, Master Corporal Bureau of the CFNIS detachment Valcartier, was awakened by her colleague Master Corporal Savard,

with orders from their superior, Master Warrant Officer Pare, to deploy to Saint-Jean-sur-Richelieu to conduct an investigation about an alleged sexual assault. They left Canadian Forces Base Valcartier together at 0630 hours with their equipment.

[20] At 0530 hours, there was a shift change at the MP detachment on garrison Saint-Jean-sur-Richelieu. Sergeant Tremblay replaced Sergeant Godin as shift IC. Corporal Molloy and Corporal Tremblay also came on shift. Despite the time of this shift change, Sergeant Godin and Corporal Lovell remained on site for a while, the last entry in their notes indicating times of 0618 and 0710 hours respectively.

[21] The CFNIS team composed of Master Corporal Savard and Master Corporal Bureau arrived at the MP detachment on garrison Saint-Jean-sur-Richelieu at approximately 0950 hours. Master Corporal Bureau made a point of mentioning on a number of occasions in her testimony, especially in cross-examination, that although she was placed in charge of the investigation, she was new to the CFNIS and had not obtained the formal qualifications to be considered fully in charge. She explained she was operating throughout in consultation with her colleague Master Corporal Savard. As she is the only CFNIS investigator who testified at the *voir dire* despite the fact that she is no longer employed by the CAF, I will refer to her and her actions from now on in these reasons, with the understanding that her actions at the time were taken in consultation with and under the general supervision and approval of Master Corporal Savard.

[22] The first action taken by Master Corporal Bureau upon arriving in Saint-Jean-sur-Richelieu Jean, was to speak with the shift IC, Sergeant Tremblay. At that time, Sergeant Godin had gone back home after the night shift. Sergeant Tremblay was, in effect, the non-commissioned member in whose custody Private McGown had been committed, as the member of the MP IC of the guardroom. In the course of her meeting with Sergeant Tremblay, Master Corporal Bureau observed Private McGown sitting in the interview room, with his head resting on a table. At around 1000 hours, in accordance with the Agreed statement of Facts produced as exhibit VD1-13, Sergeant Tremblay "was directed by Master Corporal Bureau to move Private McGown to a detention room." Master Corporal Bureau said she also directed that legal rights be given at that time. Sergeant Tremblay gave direction to Corporal Molloy to effect the room transfer.

The transfer, second caution and subsequent detention in cells

[23] Corporal Molloy took over from Corporal Lovell in supervising Private McGown while in the interview room, starting when she came on shift at about 0530 hours in the morning of 10 November 2019. She testified that Private McGown could knock on the window to get her attention if he needed anything. A DVD of the audio-video taken from the interview room (room 111) was entered as exhibit VD1-15. The video shows images of Private McGown spending some time slouched on a chair with his head resting on the table on two occasions. At approximately 0705 hours, Corporal Molloy brought a CAF box lunch to Private McGown so he could eat. Later, at about

0920 hours, Private McGown asked if he could call his father, who at that time was still serving in the CAF. After leaving for some time to get advice, Corporal Molloy came back to the interview room to tell Private McGown that he could not call his father as he had already spoken to a lawyer and they were waiting for investigators to arrive. She did offer a glass of water however. At about 1037 hours, Corporal Molloy informed Private McGown that he could be moved to a cell, which would be more comfortable for him as he could lie down. At that point in time, Private McGown had been in the interview room for over five hours.

[24] Corporal Molloy testified she then asked Private McGown if he knew why he was there, implying being detained. He answered negatively, so she explained that he was suspected of sexual assault. She asked him if he remembered the legal rights he would have been given previously and Private McGown answered negatively, once again. Corporal Molloy testified that she had been directed by "someone" to provide legal rights to Private McGown at the time of transferring him into a cell. In consultation with her partner Corporal Tremblay, she obtained a caution form which would be read to Private McGown. She told Private McGown she wanted to do a "reset".

[25] However, the process did not go smoothly. Corporal Molloy seemed unfamiliar with the form she was using as it was not adapted to the situation she found herself in, especially given the confusion on the part of Private McGown. For instance, it is dubious whether Corporal Molloy would have allowed another communication with a lawyer. However, when she read the right to counsel and provided Private McGown with an opportunity to write an answer, he initially wrote "YES", meaning to express what he had said verbally, specifically that he did not wish to speak to a lawyer right now. This prompted the "YES" to be scratched out and replaced by a "NO". She found herself providing additional information and explanations which were not on the form she was reading. This included answering a concern expressed by Private McGown, to the effect that anything he said could be used against him, to tell him that anything he said could also be used for him. In line with her departure from the form, she wrote a note in the section where phone numbers are displayed, to indicate that a call to a lawyer was made immediately following arrest, hours earlier. She also omitted to read and file the section on waiver of rights for all offences. She did give the caution for a non-specific charge although it was clear to her, as she stressed with Private McGown, that he was suspected and detained for an alleged sexual assault. She testified that she believes the specific charge caution is only given when a charge is laid. She was also uncertain about the wording of the right to counsel given the presence of a Quebec specific form that was in use at the time with her detachment, as was heard previously in relation to the confusion experienced by Sergeant Godin in the patrol car.

[26] The caution forms used by Corporal Molloy were introduced as exhibits. They show that the first caution was administered at 1051 hours and the last at 1058 hours. Immediately after the last caution was given, Corporal Tremblay assisted Corporal Molloy in moving Private McGown to a cell. Almost one hour had passed between the directions given by Master Corporal Bureau to move Private McGown from the

interview room, to the moment that he was transferred to a nearby cell. It would appear that Private McGown's initial reaction was to state that he was fine where he was, until he was told by Corporal Molloy that he had no choice in the matter and was going to move. Corporal Molloy testified that she tried to be as soft as she could with Private McGown as he appeared to her as distressed, upset, sad and nervous. Also, he was not eating or drinking. As seen in another video recording of the area of the MP detachment outside the cells, Private McGown was searched by Corporal Molloy's colleague, Corporal Tremblay. This was the second search since his arrest. This time, some coins were found on him.

[27] Shortly after 1100 hours, Private McGown was placed in a cell. The lights remained on throughout the more than seven hours he would spend there, even if he was moved to allow him an opportunity to rest. Corporal Tremblay testified that he was concerned for Private McGown's condition as he seemed extremely withdrawn. A CAF box lunch was brought to Private McGown at around 1220 hours. During his time in cells, Private McGown made one request to talk to a lawyer in the course of a visit to the bathroom in the early afternoon. His request was denied. At no point was Private McGown informed of the availability of advice from a military lawyer from the DDCS.

The investigation

[28] After speaking with Sergeant Tremblay at the MP detachment, Master Corporal Bureau's first step in her investigation of the alleged sexual assault was to attend what was described as "the green desk" at CFLRS, in the Mega building. There, she met with Warrant Officer Caron from CFLRS and was shown the outside of Private McGown's room, which by then had been cordoned off hours before by Sergeant Godin using police tape and was secured by the presence of CAF personnel acting as guard. She ensured a register was set up to record anyone's presence near the room. It was understood that she would eventually seek to obtain a warrant to search the room, but that would clearly not happen immediately given that it was Sunday.

[29] At 1100 hours, still at CFLRS, Master Corporal Bureau inquired about who was the Custody Review Officer who would be engaged in ordering the release of Private McGown and arranged a meeting with him. She met with the Custody Review Officer, Captain Bordeleau, shortly thereafter. She stressed upon him the importance to be ready when she would tell him that Private McGown can be released.

[30] By 1135 hours, Master Corporal Bureau was finished giving her instructions to Captain Bordeleau. She was confident that the Custody Review Officer was "on side" as it pertains to what she expected him to do. She was also satisfied that the presumed scene of the alleged assault, Private McGown's room, was secured. She was then ready to contact the alleged victim, dialing the number given to her previously by Sergeant Tremblay at the MP detachment. At 1140 hours, Master Corporal Bureau left a voice message to the number she had called, asking the victim to contact her so they could talk.

[31] As Master Corporal Bureau was out for lunch at around 1300 hours, her phone rang. It was the alleged victim's stepmother who was calling, as it is her who had mistakenly received the voice mail left earlier. She was agitated, wondering what had happened to her stepdaughter, who was concurrently on a face time call with her from Saint-Jean-sur-Richelieu. At around 1316 hours, Master Corporal Bureau was able to speak on the phone with the alleged victim who told her she was okay in her room at the Mega building. They arranged to meet later, a meeting which started at 1335 hours, first at the green desk at the Mega and then formally in an interview room at the MP detachment starting at 1350 hours and lasting approximately two hours. At the conclusion of the interview and after having allowed the alleged victim some private time to speak to her father, Master Corporal Bureau drove her from the MP detachment to her quarters at the Mega building at about 1645 hours. She testified that she wanted the alleged victim to be in her surroundings with her stuff as she was before their meeting. Master Corporal Bureau testified that she also made a point of speaking with a warrant officer from the alleged victim's chain of command to ensure that victim services would be able to reach her the next day, a Monday, a conversation which ended at about 1740 hours.

The interview, including the third caution and the statement

[32] Upon returning at the MP detachment, Master Corporal Bureau planned the interview she would need to conduct with the still-detained Private McGown. She testified that she did not have time to eat supper, implying she had been very busy preparing, which included receiving text messages exchanged between the alleged victim and Private McGown the previous evening. Just after 1830 hours, Master Corporal Bureau went to Private McGown's cell with other MPs to bring him once again to the interview room to commence the interview at about 1835 hours. At that point in time, Private McGown had been in custody for about fourteen hours and twenty minutes.

[33] Without going into details, the following are the main phases of the interview and the salient points as it pertains to the arguments raised by the parties:

(a) Master Corporal Bureau makes it clear right away that she is French speaking and invites Private McGown to inquire if there is anything he does not understand. Although Master Corporal Bureau made several mistakes in the choice of her English words during the interview, I do not find that language was a factor of any significance in the outcome of this application;

(b) Master Corporal Bureau is obviously aware very early in the interview about the condition of Private McGown; she asks him if he had eaten. He answered that he only ate an apple. She often refers to the fact that he must be tired. During her testimony she stated that she sought information from the MP who had kept an eye on Private McGown while in cells all day about whether he had slept or eaten but did not get

satisfactory answers. I found her very evasive on that point. I do believe Master Corporal Bureau fully knew Private McGown had not slept all day as she told him once during the interview, and that she was concerned about his fitness to be interviewed. As she admitted in cross-examination, she brushed her concerns aside and went ahead anyways. As she conveyed to him on at least two occasions: “I know you are tired but we need to get through it, get this done” or words to that effect;

(c) at the outset of the interview and at various stages she regularly reminded Private McGown that he was under arrest and/or in custody, implying this was significant;

(d) during the discussion on the right to counsel at the outset of the interview, Master Corporal Bureau did refer to whether Private McGown wished to talk to the lawyer he had spoken to again, but does not mention that he could talk to a lawyer from the DDCS. In cross-examination, she explained that this was not necessary as Private McGown had said that he did not need to talk to a lawyer right now;

(e) in the first stage of the interview, as he is discussing his girlfriend and his course, Private McGown described the things he had done the previous evening and he is not challenged when he initially denies that the alleged victim had been in his room at all the previous evening. At one point Master Corporal Bureau becomes more assertive and mentions having seen text messages to the effect that they had been together. She leaves for the first time for about ten minutes between 1925 and 1935 hours;

(f) when Master Corporal Bureau comes back, she challenges Private Mc Gown and he appears to be distraught, crying at times. He asks to see the text messages and she says he will have to wait. She leaves for approximately fifty-five minutes at 1954 hours and Private McGown remains alone in the interview room. During that time, Master Corporal Bureau discussed with Master Corporal Savard about how she should approach the remainder of the interview and obtains a print out of the text messages. When she comes back, she eventually shows Private McGown the printout of the text messages and he gradually admits having engaged in sexual activity with the alleged victim, not without several bouts of crying and saying that he just wants to get through this. However, this is not a full confession to a sexual assault charge as Private McGown’s version is to the effect that it is the alleged victim who initiated the contact, that she consented and that he was reluctant and even threatened to report her behaviour which, he suggests, led her to make a false accusation about him;

(g) the last exchange of information concerns the location of a condom used in the sexual interaction; and

(h) when Master Corporal Bureau is satisfied, she announces to Private McGown that she will release him that night. He then asks about what will happen to his Christmas leave and other conditions relating to his service.

[34] At 2140 hours, Master Corporal Bureau is done with her interrogation. She tells Private McGown she will release him with conditions. She exits the interview room for a third time, about three hours and five minutes after commencing the interrogation.

The release

[35] Private McGown remains alone for twenty-four minutes. At 2204 hours, Master Corporal Bureau is back for about a minute to tell him the Custody Review Officer is coming. She calls Captain Bordeleau, who arrives at the MP detachment about fifteen minutes later, at 2220 hours. Immediately, a disagreement arises as to the conditions for release that had been drafted. Master Corporal Bureau testified that Captain Bordeleau was not ready to perform his duty as Custody Review Officer. However, the evidence is not clear as to who had filled out the necessary paperwork to effect the release and when that was done. The Report of Custody entered as exhibit VD1-8 was apparently signed by Sergeant Godin on 10 November 2019. Yet witnesses were unable to state at what time on that day that important document was filled, no one seemingly feeling the need to take notes on that aspect of their work. What we know is that the document indicates, just above the signature of Sergeant Godin on page 2, that the person in custody refused to provide representations. That refusal appears related to a question asked of Private McGown in the interview room two minutes past midnight on 11 November 2019. It is consequently reasonable to conclude that a key document for the decision that Captain Bordeleau had to make as Custody Review Officer regarding release was not given to him until long after he arrived at the MP detachment at 2230 hours on 10 November 2019. It is therefore impossible for me to accept Master Corporal Bureau's affirmation to the effect that Captain Bordeleau was not ready. It would appear someone did not get the required documents properly prepared for Captain Bordeleau to be ready.

[36] What is known is that almost two hours elapsed between the time Private McGown is told in the interview room that the Custody Review Officer is coming and the time the door of the interview room reopens with Master Corporal Bureau and Sergeant Godin coming in to ask Private McGown if he wishes to make a statement regarding his continued detention. The cross-examination revealed that during this time, a disagreement arose, centered on whether a weapons prohibition should be imposed as a condition of release and whether Master Corporal Bureau would answer questions on the investigation to assist Captain Bordeleau in coming to a decision on imposing that condition or not. When Sergeant Godin walks in the interview room at 0002 hours on 11 November 2019 and asks Private McGown if he wishes to provide a statement, the reply from the detainee is that he is too tired, specifically "Right now, I can't even keep my eyes open". Sergeant

Godin does not appear to be phased by the answer, confirms that Private McGown does not wish to make a statement and exits the room at 0003 hours. Indeed, the statement of the person detained is at that point entirely irrelevant because the decision to release has already been made. At 0007 hours Master Corporal Bureau walks in the interview room to say it will not be long and at 0011 hours a larger group of people come in. Captain Bordeleau is introduced to Private McGown as the Custody Review Officer, and his conditions of release are explained. At 0016 hours Captain Bordeleau and Sergeant Godin walk out, they make copies of documents. At 0031 hours Sergeant Godin is back in the interview room, and has paperwork for Private McGown and tells him that he is released.

[37] The total duration of custody is from 0415 hours on 10 November 2019 to 0031 hours on 11 November 2019, a duration of twenty hours and sixteen minutes.

Position of the parties

[38] The prosecution submits that it has proven the voluntariness of the statement given by Private McGown beyond a reasonable doubt on the basis of the applicable law. Despite conceding that the actions of the MP may, at times, have been short of what was most desirable to Private McGown, both in terms of practical comfort and in terms of compliance with formal requirements on the right to counsel and custody, these departures went to form only and had no impact on the voluntariness of the statement given to Master Corporal Bureau. In reply to the *Charter* application, the prosecution submits that there was no violation of Private McGown's right to counsel by virtue of the fact that DDCS was not mentioned at any time during the reading of the rights as this is not required by QR&O article 105.08. Arguing that even if rights given did not conform to Note(A) to QR&O article 105.08, such a note is for guidance only and does not have force and effect of law. It is also argued that should a breach of Private McGown's *Charter* rights be found, it should be ruled to be inconsequential.

[39] The defence submits that this case reveals significant failures on the part of the MP and CFNIS officers, resulting in Private McGown's rights being violated in a manner which would be shocking to the community. It is argued that throughout his arrest and detention, Private McGown was subjected to improper inducements and pressure, as well as unfair trickery related to his continued custody. As it pertains to the right to counsel and its *Charter* application, the defence submits that the failure to inform Private McGown of the availability of uniformed defence counsel from the DDCS, had the effect of denying him the right to counsel in the specific circumstances in which he found himself at the time, that is being held in service custody by military authorities under a regime foreign to a provincial legal aid lawyer. That failure, it is argued, had consequences on the statement given while in custody and warrants exclusion.

The law pertaining to the admissibility of the statement given to police

[40] The applicable law pertaining to the voluntariness of statements given to police was set by the Supreme Court of Canada (SCC) in the case of *R. v. Oickle*, 2000, SCC 38 where Iacobucci J., for the majority, explained that the jurisprudence followed two main

streams as it pertains to the confessions rule. The traditional approach, based on the British Privy Council decision in the case of *Ibrahim v. The King*, [1914] A.C. 599 (P.C.) is narrow, excluding statements only where the police held out explicit threats or promises to the accused. Unsurprisingly, this is the approach taken in the *Military Rules of Evidence* (*MRE*), passed, for the most part, in 1959. Article 42 (1) of the *MRE* is to that effect.

[41] The second stream of the SCC jurisprudence referred to by Iacobucci J., recognized a much broader approach to the analysis of voluntariness, according to which the absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent. In doing so, he referred to *R. v. Hebert*, [1990] 2 S.C.R. 151 at page 166 and concluded that "Clearly, the confessions rule embraces more than the narrow *Ibrahim* formulation; instead, it is concerned with voluntariness, broadly understood." This approach was followed by courts martial since, despite the narrow approach found in the *MRE*. For instance, as decided in the court martial case of *R v Déry*, 2013 CM 3023 at paragraph 18, the assessment of the voluntariness of a statement sought to be admitted at courts martial requires the application of the factors outlined in *Oickle*, in order to provide the framework most favourable to the accused.

[42] In applying the confessions rule to assess the admissibility of a statement, the law requires that a trial judge consider all the relevant factors as the application of the rule will, by necessity, be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession. The relevant factors when reviewing a confession include the following;

(a) improper inducements: The classic threats or promises fall in this category but there is more. Inducements include, for instance, explicit offers by the police to procure lenient treatment in return for a confession. This very strong inducement will cause an ensuing confession to be excluded in all but exceptional circumstances. The *Ibrahim* rule speaks not only of hope of advantage, but also of fear of prejudice. Obviously, any confession that is the product of outright violence is involuntary and unreliable, and therefore inadmissible. More common, and more challenging judicially, are the more subtle, veiled threats that can be used against suspects. For instance, phrases like, it would be better if you told the truth, should not automatically require exclusion. Instead, as in all cases, the trial judge must examine the entire context of the confession, and ask whether there is a reasonable doubt that the resulting confession was involuntary.
Courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. There can be few detainees who are being firmly but fairly

questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession. This hope could be self-generated, in which case it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly, the presence of such hope will, in part at least, owe its origin to something said or done by such a person. The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise;

(b) atmosphere of oppression: Oppression clearly has the potential to produce false confessions. If the police create conditions distasteful enough, it should be of no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession. Under inhumane conditions, one can hardly be surprised if a suspect confesses purely out of a desire to escape those conditions. Such a confession is not voluntary. The non-exhaustive list of factors that can create an atmosphere of oppression include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time. Also, the police use of non-existent evidence, when combined with other factors, is certainly a relevant consideration in determining on a *voir dire* whether a confession was voluntary;

(c) operating mind: The requirement that the confession be the product of an operating mind does not require any higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment. The operating mind doctrine is just one application of the general rule that involuntary confessions are inadmissible and should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule; and

(d) other police trickery: A final consideration in determining whether a confession is voluntary or not is the police use of trickery to obtain a confession. Unlike the previous three headings, this doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system. *Oickle* recognized that there may be situations in which police trickery, though not undermining voluntariness per se, is so appalling as to shock the community. Citing with approbation the concurrent reasons of Lamer J., in *Rothman v. The Queen*, [1981] 1 S.C.R. 640, Iacobucci J. stated that the analysis should focus not on the determination of whether the statement is

> or is not reliable, but whether the authorities have done or said anything that could have induced the accused to make a statement which was or might be untrue. "The inquiry is not concerned with reliability but with the authorities' conduct as regards reliability."

[43] The basic rule is that a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. The relevant factors I just discussed do not operate independently from each other. Oppressive conditions and inducements can operate together to exclude confessions, for instance in grounding a reasonable doubt as to whether an accused had the required operating mind to confess.

[44] The SCC invites trial judges to be alert to the entire circumstances surrounding a statement in deciding whether it should be admitted. Even if voluntariness is the touchstone of the confessions rule, the term voluntariness is useful to describe the various rationales underlying the confessions rule. Indeed, the confessions rule also extends to protect a broader conception of voluntariness that focuses on the protection of the accused's rights and fairness in the criminal process.

Analysis

The context

[45] In its efforts to restate the confessions rule at the outset of the analysis in *Oickle*, Iacobucci J. mentioned the important role of false confessions in convicting the innocent and the need to understand why false confessions occur. One important aspect to be taken into consideration by judges is the need to be sensitive to the particularities of the individual suspect, which may render them unable to confess voluntarily. As stated in *Oickle* and since, the application of the confessions rule needs to be contextual.

[46] In this instance, the suspect was a relatively young recruit, in a controlled training environment at the CFLRS, as Private McGown explained in his testimony. That being stated, I do not accept the evidence of Private McGown to the effect that rank meant everything for him, suggesting that he had lost the capacity to decide anything for himself by virtue of the rank of the person talking to him. I also find entirely non-credible his bizarre assertion to the effect that he would only understand an interaction based on orders and would be having difficulties understanding any question not formulated as an order. Despite that, I found his testimony to be largely non-credible, I do accept that Private McGown had challenges understanding people who entered into relation with him on 10 and 11 November 2019, but conclude this is most likely due to two factors: the significant stress he was under at the time, having been arrested and detained for a serious offence, and his lack of sleep and nourishment.

[47] The evidence confirms that the environment at the CFLRS was very controlled, made up of long days spent by candidates training, studying and preparing for inspections the next day, as well as eating and sleeping at given times within the Mega building. It is

obvious that Private McGown was treated severely, as recruits should, as demonstrated by the way Captain Bordeleau, addressed him when explaining his conditions for release.

[48] The evidence also allows the inference that the CFLRS had the power to subject Private McGown to a significant level of control as to where he would reside under military authority and what he would be allowed to do. For instance, the Account in Writing mentions that Private McGown's room would remain inaccessible to him and that he would reside elsewhere in the Mega building at the Saint-Jean garrison. The conditions for release imposed and the level of supervision required to monitor them also point to a very strict and controlled military environment. This context is important to assess the options available to authorities in dealing with Private McGown, notably the alternatives to maintaining him in custody. His situation was different than the situation, for instance, of a trained member of the CAF who is reporting for duty in the course of a normal work day and is otherwise free to do as he or she pleases, including coming home to a residence off base.

[49] Other relevant aspects of the context in this case are the varying levels of experience and knowledge of pertaining rules and regulations of the members of the MP involved about some aspects of their duties pertaining to custody. Explanations have changed depending on who answered questions about matters such as what must be said to properly provide and explain legal rights, which legal aid service should be discussed or called and the wording of cautions and use of a caution for specific or non-specific charges. Notes were not kept about the what, who, how and why of a number of decisions, including the timings and details about filling out important documents and forms. The reason why Private McGown was detained in an interview room for more than six hours while perfectly operational cells were available a few metres away has not been satisfactorily explained by MP witnesses, as conceded by the prosecution.

[50] There are no doubt some good faith errors that have been made. However, when dealing with fundamental rights and freedoms of persons detained, police have an obligation to get it right. I am generally concerned about what this case has shown about the ability of members of the MP to apply the prescribed regime governing custody of CAF members. This is not all their fault: the framework pertaining to legal rights and caution is confusing and potentially contradictory on details when looked across the spectrum of directives and orders applicable. It is time for a significant review of this area of military law. In the interim, in relation to this case, I find myself unable to confidently assume that the members of the MP involved have done the right thing and have been entirely forthright in explaining what they had done before me. This is obviously concerning.

[51] The ability of members of the MP to know and do the right thing is, of course, even more important for members of their elite investigative branch, the CFNIS. In this case, the only member of that elite team who testified was Master Corporal Bureau. She came across as a highly capable, intelligent and, as evidenced by her interrogation of Private McGown, a very efficient former member of the CFNIS. Contrary to the other members of the MP involved, I have no doubt that she fully understood the regulatory

framework applicable to the custody of CAF members generally and the custody of Private McGown specifically. However, she chose to use that knowledge to manoeuvre in such a way as to effectively decide that Private McGown would not be released until after she had the opportunity to interrogate him while in custody, in blatant disregard for the applicable rules of military law governing the review of custody and the roles of the other important actors involved.

The concern with the circumstances of the statement in this case

[52] My conclusion is that the MP, in ensuring that Private McGown would be still in custody at the time of his interrogation, used trickery that is connected to the statement that was ultimately obtained. This is the type of situation foreseen by *Oickle*, which recognized the doctrine of inappropriate police trickery as a distinct inquiry in the voluntariness analysis, with the objective of maintaining the integrity of the criminal justice system. *Oickle* recognized that there may be situations in which police trickery, though not undermining voluntariness per se, is so appalling as to shock the community. This is the case here and I will now briefly explain why.

What is not a concern?

[53] Before going into more details about what concerns me, it may be useful to explain what does not. First, the circumstances surrounding the statement in this case do not, in my view, concern any inducements. A poor analogy was attempted by Master Corporal Bureau with a glass of water getting increasingly full with each piece of damming evidence against Private McGown, who was told that it is up to him to help the investigator understand what had happened to avoid the glass over spilling. Yet, this reference is akin to telling him that it would be better if he told the truth without offering anything in return, no quid pro quo. There are no inducements here which, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of Private McGown has been overborne.

[54] Also, I am not concerned about whether Private McGown lacked the required operating mind to decide whether or not to talk to police. I do agree with the prosecution that the unfolding of the interrogation reveals that Private McGown provided answers consistent with his awareness that what he said could be used against him. He first denied that the alleged victim had been in his room at all. He then acknowledged that she had been around the area, then that indeed she had sat on his bed for a short time then, once confronted with text messages, that they had watched a movie at least in part, until he ultimately admitted that they had sexual intercourses at her initiative, for a short time. Given that the operating mind requirement does not require any higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment, I have no hesitation to conclude that this is not a factor here.

Oppression

[55] The issue of oppression is more difficult to analyze given that the police did create some distasteful conditions, in placing Private McGown in a situation where he would be necessarily sleep-deprived, being held for almost six hours in an interview room after having been awakened in his room at 0415 hours to be arrested for sex assault. Acknowledging that Private McGown was moved to a cell shortly after 1100 hours to be more comfortable and have the opportunity to use a bed to sleep, it remains that in my view it would have been obvious to Master Corporal Bureau, when preparing her interview with Private McGown between 1740 and 1830 hours, that she would be dealing with a suspect who had little to no sleep in the previous fourteen hours. She did admit in cross-examination that this was a concern to her, despite the doubts she expressed in her testimony about the report made to her by the MP on shift about Private McGown's condition in the hours since she had seen him in the morning.

[56] In any event, during the interview, Master Corporal Bureau inquired very early on whether Private McGown had eaten and then offers on her own at page 13 of the transcript of the interview, exhibit VD 1-12, "so you didn't sleep at all. You must be very tired". I believe the first sentence referred to the information she was given. While I can accept her explanation to the effect that the second sentence was an attempt at creating a rapport with Private McGown to eventually obtain information from him, I note that she referred to him being tired on at least four other occasions during the interview. Having seen the images as well, I infer that she remarked that he was tired simply after noticing how tired he looked. Furthermore, on four occasions, in the second half of the interview, Private McGown says that he just wants to get this over with or be through with it, suggesting, both in words and demeanor, that he was indeed very tired.

[57] This would be enough to ground a reasonable doubt about the possibility that Private McGown would make a stress-compliant confession to escape the conditions he had been under for quite some time, including being sleep-deprived.

Other police trickery

[58] However, the main reason why I do have a reasonable doubt about the voluntariness of the statement in the circumstances of this case is because of the link between the sleep deprivation Private McGown suffered from, and the fact that he was held in custody much longer than necessary for the purpose of allowing police to use his status as a detainee to obtain a statement from him. I consider this to be police trickery.

[59] Two aspects lead me to that conclusion. First, the continued custody was made possible through the manipulation by police and to an extent, unit authorities, in blatant and, in the case of Master Corporal Bureau, wilful disregard of applicable legal and regulatory framework. Second, the continued custody was used as a tool in the course of the interview, on its own and in relation to its intended consequence of softening up the suspect and pressure him in giving a statement. I will deal with these in turn.

Maintaining Private McGown in custody in blatant disregard of legal framework

[60] The framework applicable to military custody is fundamentally different from the civilian framework in many significant ways, even if some similarities have been built in in recent years. The military justice system recognizes that due to the nature of military service, access to both police officers and judicial officials may at times be difficult. The *NDA* provides for powers of arrest to members of the chain of command in certain circumstances. It provides for a power to issue arrest warrants to commanding officers and delegated officers. It also provides for a power to review the custody of persons detained, in the form of the Custody Review Officer, who is typically from the accused's military unit. Along with commanding officers and delegated officers, Custody Review Officers perform quasi-judicial duties typical of military officers since the birth of modern military law, as recognized by the SCC in *MacKay v. The Queen* [1980] 2 S.C.R. 370. This makes sense: access to a judge could be difficult, hence not timely in many military circumstances. The Custody Review Officer is then habilitated to make the decision to release or not and with or without conditions, although his or her discretion is limited when a person detained is suspected or charged with a designated offence.

[61] Perhaps one of the most striking features of the interim release in Canadian military law is that persons subject to the Code of Service Discipline will usually be released without charges having been laid against them. In this case, I am informed that Private McGown was charged by the CFNIS on 14 September 2020, over ten months past his release from custody.

[62] The custody process is meant to unfold in a manner that is strictly structured, with the role of defined actors being provided for at each step, along with the required documents and forms to record the actions taken. This structure has been added in recognition of the fact that persons subject to the Code of Service Discipline will often be placed under arrest at the unit level, for breaches of discipline within or in relation to that unit, revealing potential tensions with officers entrusted with quasi-judicial duties. It is to ensure that these persons focus on their duty and avoid informal discipline where CAF members would be held incommunicado that the regulations are so precise and formal. As I have acknowledged at the hearing however, the very precise nature of the provision of Chapter 105 of the QR&O and the many steps involved combine to create several possibilities for errors to be made.

[63] Indeed, there are a number of very preoccupying mishaps which occurred in this case, in relation to Private McGown's custody both as it pertains to respect of the regulatory framework and in relation to how he was or should have been dealt with. Here are the problematic areas and main deficiencies.

(a) the arresting officer in this case was Corporal Lovell, which was entirely appropriate given that his superior at the time was Sergeant Godin, who was also supervising the guardroom as shift IC at the MP detachment and could not therefore perform both functions. The Account in Writing reveals that a decision was made at 0510 hours to retain Private McGown in custody, hence the requirement to fill out that document to be delivered to Sergeant Godin at 0515 hours. Unfortunately, that is where the mistakes

arise: as explained previously, it would appear that the Account in Writing was not delivered to Sergeant Godin at the time stipulated in the document. The explanations on the document do not make sense: the stated reasons for arrest belong, in part to the section on explanations for the decision to hold the person in custody. On the other hand, those explanations as to why Private McGown should be retained in custody refer to an NIS interview and residence upon release which occurred in the future and could therefore not have been at 0515 hours;

(b) the obvious confusion in the drafting of the Account in Writing may have led to the commission of three other mishaps:

i. first, no evidence was heard to the effect that Private McGown was informed that he was retained in custody as required by then QR&O paragraph 105.12 (2), (since 20 June 2022 QR&O article 105.121);

ii. second, the lack of focus on the requirement of a transfer from the arresting officer to the IC guardroom who is obliged to receive the person in service custody in accordance with QR&O articles 112.14 and 112.15 may have contributed to the ill-advised decision to hold Private McGown in the interview room of the MP detachment instead of in cells; and

iii. third, the uncertainty about when and how the account in writing should be completed likely led to the omission to provide a copy to Private McGown, as required at QR&O paragraph 105.16(2);

(c) therefore, within one hour of his arrest, Private McGown's rights, as provided in regulations, were infringed upon in three distinct ways. However, he was not aware of that because no one had told him that he could have access to advice from a legal officer from the DDCS who would be familiar with the provisions of military law applicable to service custody. This is not to say that Private McGown received improper advice: the civilian lawyer he spoke to made a point of speaking with Sergeant Godin to inquire about his intention. What he wanted to know was whether a charge or charges would be laid and when, triggering the release procedure he was familiar with in the civilian justice system.

Yet, the system is different in the military. Private McGown was about to be committed to service custody, a system completely different than what the civilian lawyer was accustomed to. The evidence is to the effect that there was never any consideration given to commit Private McGown to civil custody at any point. QR&O article 101.11 provides that one of the duties of the DDCS is the provision of legal advice to a person arrested or detained in respect of a service offence. The testimony of Sergeant Godin is

entirely unconvincing as to the fact that he considered a sexual assault to be a *Criminal Code* offence which did not require him to inform Private McGown of the availability of advice from the DDCS. He decided to provide Private McGown with only the information pertaining to provincial legal aid, after some confusion reading from a card obtained from the court liaison officer from the military police in St-Jean-sur-Richelieu, a local initiative that is in direct contradiction with the provision of QR&O subparagraph 105.08 (1) (*d*) which requires that "a person who is arrested or detained shall, without delay, be informed that the person has the right to have access to free and immediate advice from duty counsel provided by the Director of Defence Counsel Services or other duty counsel in the jurisdiction where the person is arrested or detained, and how duty counsel may be contacted."

Private McGown was not informed of that right, not just at the time of his arrest but on two subsequent occasions where his legal rights were read to him by two other members of the military police. I agree with the submission of defence counsel to the effect that QR&O article 105.08 requires that information to be provided as it is the only interpretation of the regulation that is consistent with the note to that article. Information about DDCS was not optional under the applicable regulations;

(d) the next mishaps is the failure by Sergeant Godin or his relief as IC guardroom to provide a report of custody to the Custody Review Officer as soon as practicable, as provided for at section 158.1 of the *NDA*. Indeed, although it was likely too much to ask from Sergeant Godin to awaken a Custody Review Officer before going off the night shift at about 0530 hours, possibly fifteen minutes after receiving the Account in Writing from Corporal Lovell, it would have been possible for Sergeant Tremblay to do so. The evidence reveals that Captain Bordeleau was reached by Master Corporal Bureau within about an hour of arriving at the MP detachment in St-Jean-sur-Richelieu and the two were meeting a few minutes later. We also know Captain Bordeleau was able to report to the MP detachment within fifteen minutes of being called shortly after 2200 hours the same day. Clearly then, the Custody Review Officer in this case was reachable and available at short notice. It is reasonable to infer that Captain Bordeleau was available to receive a Report of Custody at any time during the day, just as he was able to meet Master Corporal Bureau on short notice between 1100 and 1130 hours on 10 November 2019. The Report of Custody would have been accompanied by the Account in Writing and any representations made by or on behalf of the person in custody or a statement confirming that the person was given the opportunity to make representations but did not do so.

What could have been done in the morning was not done until a few minutes past midnight the next day, depriving the Custody Review Officer

of the opportunity to release Private McGown ahead of the time he was ultimately released. I acknowledge the representation made by the prosecution to the effect that the IC of the guardhouse had up to twenty-four hours after the arrest of Private McGown to deliver a report of custody but I respectfully disagree with the implication that the requirement is met as long as the Report of Custody is delivered before that twenty-four hour mark. The requirement is that the Report of Custody be delivered as soon as practicable. The evidence reveals that it would have been entirely practicable for the IC of the guardhouse to deliver that report in the morning of 10 November 2019; and

(e) the final and most disturbing mishap is the meeting between Master Corporal Bureau and Captain Bordeleau at about 1100 hours, just over one hour after she arrived in Saint-Jean-sur-Richelieu. She testified that she wanted the Custody Review Officer to be ready to release Private McGown when she would tell him he can be released. This may seem like a nice gesture on her part to the benefit of the person in custody. However, under military law Master Corporal Bureau does not have the authority to decide when Private McGown would be released. This authority belongs exclusively to the Custody Review Officer, once the person making the arrest has committed the arrested person to the care of the non-commissioned member IC of the guardroom, in this case the shift IC at the MP detachment. In conveying, no doubt forcibly, to Captain Bordeleau that she decided when Private McGown would be released from custody, Master Corporal Bureau usurped the Custody Review Officer's competence and authority, very much to the detriment of Private McGown's release. Worse, by also conveying to the shift IC that she decided when Private McGown would be released, Master Corporal Bureau would have, in effect, stopped the process of preparing the Report of Custody and delivering it to the Custody Review Officer, the only means by which Captain Bordeleau or anyone else could be seized of the authority to release Private McGown once he had been formally committed to service custody.

Not only did that happen with all its negative effects in law, I am convinced that this is exactly what Master Corporal Bureau intended to happen by her actions, including specifically to obtain the coordinates and meet with the Custody Review Officer even before she would contact the alleged victim of the alleged crime which she had travelled to St-Jean-sur-Richelieu to investigate. Sergeant Godin was very clear in his testimony about the fact that he would never question a decision by a NIS investigator not to release the suspect in a CFNIS investigation even if that suspect had been committed to him, as in this case. That is understood yet completely wrong in law.

At that point, the only thing that could have placed matters back on the rails was if the Custody Review Officer, well aware of the regulatory framework governing his actions and very courageous in his resolve to stand up to a CFNIS investigator, would have told Master Corporal Bureau something like "You want me to be ready to release, then where is my Report of Custody?" Captain Bordeleau did not testify and no blame is intended on him but evidently this did not happen. The Report of Custody was in all likelihood not prepared or finalized until Master Corporal Bureau had directed the release of Private McGown. Indeed, it could not be delivered to the Custody Review Officer until Private McGown was given an opportunity to make a statement on his release from custody, a step which did not take place until two minutes past midnight on 11 November 2019. In effect, Private McGown was in legal limbo from the forenoon of the day of his arrest until the early hours of the next day.

The prosecutor asked Master Corporal Bureau on occasions during her examination-in-chief whether she could, at that point in her narrative of events, release Private McGown and if not, why. This led to very unconvincing explanations by Master Corporal Bureau but was also a smoke screen. Indeed, Master Corporal Bureau was never in the chain of decision, in law, as it pertains to the release of Private McGown. Whether she was ready to release was irrelevant. What can be inferred from the evidence is this:

i. first, that the alleged victim was safe throughout and would have remained safe with Private McGown released from conditions as he eventually was;

ii. second, the presumed crime scene, namely Private McGown's room, was secured, cordoned off and under guard from the time of his arrest and remained so until a search warrant was obtained and executed the next day, hours after his release; and

iii. third, Private McGown was released when and only when Master Corporal Bureau was done interrogating him. As soon as he was done answering the last substantial question, Master Corporal Bureau told Private McGown "I will release you tonight" at page 89 of the transcript of the interview, mentioning in the same breath that he would be sleeping in a different room, thereby revealing that a plan had been made in advance.

There is nothing substantial that could have prevented the release to take place earlier, except the wishes of Master Corporal Bureau to interrogate someone who was in custody.

[64] One might ask, as suggested by the prosecution, why these mishaps are so important from the perspective of the issue that I am analyzing, the voluntariness of Private McGown's statement to police? My answer is that it is important and concerning because at the outset and during the interview, Master Corporal Bureau reminded Private McGown that he was in custody, hence that he could only go freely to sleep once they were done. The following extracts are telling in that regard:

(a) immediately after going through the legal rights and asking a few questions to get to know Private McGown, Master Corporal Bureau gets right on the subject by asking Private McGown if he sexually assaulted the alleged victim. He answers no. Then the following exchange takes place at page 16:

> "Bureau: Okay. It's the time for you to explain what happened and to let me understand what happened because right now, I have one story.
>
> McGown: I understand.
>
> Bureau: One side of the (inaudible) and you are under arrest.
>
> McGown: Yes.
>
> Bureau: It means a lot."

(b) after the interview gets initially bogged down with Private McGown denying and claiming not remembering any interaction of substance with the alleged victim, Master Corporal Bureau asks him if he spoke to her later in the night and engages the suspect in the following manner at page 35:

> "McGown: I don't remember.
>
> Bureau: No? O.K. Can you tell me, how do you feel about the fact that you are under arrest for sexual assault right now?
>
> McGown: For the first time I am scared. "

(c) shortly thereafter at page 40, a telling extract, just as Master Corporal Bureau gets bogged down and is not progressing towards any kind of confession, she decides to remind Private McGown once again that he is in custody, prior to taking a break to allow him to think about the fact that she has evidence against him. Here is the exchange:

> "McGown: That's all I remember.

> Bureau: Okay, what I'm going to do right now is I know that you've been waiting all day long, but you are in custody.
>
> McGown: Yes.
>
> Bureau: Okay. So at the time we are here and we are going through it. I will let you think about the fact that I know that you are having text messages with (name of alleged victim) and I know what it was written on it."

Conclusion

[65] I conclude, on the basis of the relevant circumstances and the applicable law, that the Court needs to dissociate itself from the conduct of police in this case by ruling that the statement given by Private McGown to the CFNIS on 10 and 11 November 2019 to be inadmissible for all purposes in the course of the upcoming trial before the GCM.

[66] In the circumstances, I do not need to address the *Charter* application filed by the defence, as the remedy for the alleged violation of the rights of Private McGown under paragraph 10(b) of the *Charter* has already been provided through other means. Regardless, I wish to mention that I do not consider that the finding I made to the effect that the failure of police to inform Private McGown on arrest and subsequently of the availability of defence counsel from DDCS is contrary to the provision of QR&O article 105.08 is necessarily determinative for the question of whether such failure constitutes a *Charter* breach under paragraph 10(b). This interesting debate is in my view better left for another day.

[67] I wish to address in closing the argument of the prosecution to the effect that the public would not be outraged by the fact that a person suspected of a serious sexual assault be detained for not even twenty hours following arrest. I agree that stating the facts that way does not sound so bad at all. However, the public perception which may shock the community is the perception of an informed public. I do believe that an appropriately informed public would recognize that a person, even when suspected of a serious offence such as sexual assault still cannot be held by police outside of and therefore without the protection of the legal framework put in place to govern this custody. This is what this decision in this *voir dire* is about. It may be that the legal framework should be different or the same as the civilian framework but that is not for me to decide. The bottom line is that I believe an informed public will appreciate that a citizen detained outside of the applicable legal framework is, in effect arbitrarily detained, a violation of a right that is recognized in section 9 of the *Charter*, which is clearly a legal instrument of significant value to Canadians. That informed public could and should very well be outraged.

[68] I believe it is appropriate to close this decision with a quote from the United States Supreme Court, found at paragraph 70 of *Oickle*, from *Blackburn v. Alabama*, 361 U.S. 199 (1960), at page 207:

> The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

FOR THESE REASONS, THE COURT

[69] **FINDS** the statement inadmissible for all purposes.

Counsel:

Lieutenant(N) B. Wentzell and Lieutenant Commander F. Gonsalves, Defence Counsel Services, Counsel for the Applicant, Private C.J. McGown

The Director of Military Prosecutions as represented by Major M. Reede and Captain D. Morrison, Counsel for the Respondent