COURT MARTIAL

Citation: *R v Moriarity*, 2012 CM 3022

Date: 20121205
Docket: 201229

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty, the Queen

– and –

Captain D.J. Moriarity, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the persons described in this judgement as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Captain Moriarity was found guilty by this court of four offences punishable under section 130 of the *National Defence Act*: the two first ones for sexual exploitation contrary to section 153 of the *Criminal Code*, the third one for sexual assault contrary to section 271 of the *Criminal Code*, and the fourth one for invitation to sexual touching contrary to section 152 of the *Criminal Code*.

[2] The two sexual exploitation offences involving a female complainant relate to incidents that occurred at Vernon Army Cadet Summer Training Centre, British Columbia, in July and August 2010 and in March 2011. The two other offences, involving a male complainant, relate to incidents that occurred at Ashton Armoury, Victoria, British Columbia, between May 2009 and July 2011.

[3] As the military judge presiding at this Standing Court Martial, it is now my duty to determine the sentence.

[4] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the Canadian Forces. The purpose of this system is to prevent misconduct, or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish in a trusting, reliable manner successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[5] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces (see *R* v *Généreux* [1992] 1 SCR 259 at 293).

[6] The same court also recognised in the same decision at paragraph 31 that:

> Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.

[7] That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[8] Here, in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to imprisonment for a period of twelve months, to dismissal for Her Majesty’s services, and to reduction in rank to the rank of second lieutenant, in order to meet the justice requirements. Although this court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest (see *R* v *Taylor*, 2008 CMAC 1 at paragraph 21).

[9] Imposing a sentence is the most difficult task for a judge. As the Supreme Court of Canada recognized in *Généreux* at page 293 in order, "to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." It emphasized that, in the particular context of military justice, "breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct." However, the law does not allow a military court to impose a sentence that would be

beyond what is required in the circumstances of a case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[10] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

a. to protect the public, which includes the Canadian Forces;

b. to denounce unlawful conduct;

c. to deter the offender and other persons from committing the same offences;

d. to separate offenders from society, where necessary; and

e. to rehabilitate and reform offenders.

[11] When imposing a sentence, a military court must also take into consideration the following principles:

a. a sentence must be proportionate to the gravity of the offence;

b. a sentence must be proportionate to the responsibility and previous character of the offender;

c. a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

d. an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances. In short, the court should impose a sentence of imprisonment or detention only as a last resort, as it was established by the Court Martial Appeal Court and the Supreme Court of Canada decisions; and,

e. lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[12] The court is of the opinion that sentencing in this case should focus on the objectives of denunciation and general deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from re-offending, but also deter others in similar situations from engaging in the

same prohibited conduct. Furthermore, it should be noted that section 718.01 of the *Criminal Code* states that the court must give primary consideration to those two objectives when a person under 18 years of age is subjected to abuse.

[13] As mentioned earlier, I am dealing with various offences in this matter. Regarding section 153 of the *Criminal Code*, it appears that the nature of this offence aims essentially to prohibit exploitation of a young person's vulnerability by an adult for a sexual purpose. To that effect, Justice Laforest of the Supreme Court of Canada, in his analysis of the notion of trust attached to this section while writing for the majority in *R* v *Audet*, [1996] 2 S.C.R. 171, described Parliament's purpose and objective in relation to this section as follows at paragraphs 35 and 36:

> 35. The French word "*confiance*", according to *Le Grand Robert*, is a belief in or firm expectation of something, or faith in someone, and the confidence that results therefrom. In English, the word "trust" can have various meanings, especially in a legal context. However, considering that Parliament used the word "*confiance*" in the French version, I doubt that the word "trust" as used in s. 153(1) refers to the concept as defined in equity. I therefore agree with the reservations expressed by Blair J. "Trust" must instead be interpreted in accordance with its primary meaning: "[c]onfidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement". The word "confidence" is defined as follows: "[t]he mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith".
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> 36. I would add that the definition of the words used by Parliament, like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective pursued by Parliament of protecting the interests of young persons who, due to the nature of their relationships with certain persons, are in a position of <u>vulnerability</u> and <u>weakness</u> in relation to those persons.

[14] With regard to the charge of invitation to sexual touching, this offence makes criminal a conduct that might lead up to assaultive behaviour. This offence does not require actual physical contact.

[15] Concerning the sexual assault offence, I would like to mention that in the Supreme Court of Canada decision of *R* v *Ewanchuk*, [1999] 1 S.C.R. 330, Justice Major expressed the reasoning that supports the fact of criminalizing assault, when he said at paragraph 28:

> The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force.

[16] Like the civilian courts, military courts are sensitive to offences of this type relating to an abuse of trust or authority in the context of such a movement for young persons, particularly when this abuse involves an adult and the physical and psychological integrity of a young person. In such a context, this abuse has an impact on the cohesion

and morale of cadet units and their members, since it is a matter of applying the principles of respect for others, integrity and responsibility which must be followed by all adult Canadians, including Canadian Forces members, and even more particularly Cadet Instructors Cadre (CIC) officers in the Canadian Cadet Movement.

[17] It is important to recall that the Canadian Cadet Organization is a youth program sponsored by the federal government and that it is not comprised in the Canadian Forces, as set forth at subsection 46(3) of the *National Defence Act*. Cadets are youth of no less than 12 years of age who have not attained 19 years of age, as specified at subsection 46(1) of the *National Defence Act*. It should be noted that this same subsection states that the authority to form a cadet organization resides with the Minister of National Defence, and that such an organization is placed under the control and supervision of the Canadian Forces.

[18] As set forth at Chapter 11-03 of the Cadet Administrative and Training Orders (CATO) made under the authority of the Chief of the Defence Staff, the Cadet Program's mission is as follows:

> "6. **Mission**. The mission of the Cadet Program is to contribute to the development and preparation of youth for the transition to adulthood, enabling them to meet the challenges of modern society through a dynamic, community-based program."

[19] Only the officers in the CIC are Canadian Forces members. The CIC is a sub-component of the Reserve Force, which is comprised in the Canadian Forces, just as are the Regular Force and the Special Force, as set out in Chapter 2-8 of the *Canadian Forces Administrative Orders* (CFAOs), also made under the authority of the Chief of the Defence Staff.

[20] The duties of CIC officers are to administer, train and supervise cadets, as provided by Chapter 23-01 of the CATOs. As part of summer training, staff cadets and cadets are cadets who may assist officers with training, supervision and administrative duties. Obviously, just as in the Canadian Forces, there is a hierarchy between CIC officers, staff cadets and cadets on account of the rank and functions of each.

[21] The offender met a female cadet in March 2007 at a week-long training concentration at Vernon Army Cadet Summer Training Centre (VACSTC) in Vernon, British Columbia. She was 13 years old at the time. They developed a long distance relationship for over four years in which they had numerous exchanges through email, text messages and internet chat messages. During all those years, they had discussions of a sexual nature, most of them initiated by the offender. The female cadet provided him at least 30 explicit photographs or videos where she posed partially or fully nude.

[22] During the summer of 2010, they did meet at VACSTC, not very often. They had sexual intercourse twice on that summer on the camp, one time in July, the other in August. They continued to communicate with each other by the same means up to the

time they saw each other at another spring rifle training concentration at VACSTC in March 2011. They met late one night and they had sexual intercourse.

[23] Living in a different city, the female cadet made plans to move in Victoria where the offender lived. In the summer of 2011, she was made aware that the offender was returned to his unit because he had engaged in inappropriate sexual conversation with a cadet online. She then decided to disclose her relationship with the offender to the military police.

[24] During the spring of 2008, the offender started to develop at his home cadet corps a relationship with a male cadet. It started as a professional relationship. The offender added the male cadet as his friend on his Facebook account. After several months, the offender started to make inappropriate comments of a sexual nature through online discussions. He also asked the male cadet in the year 2009 questions related to his sexual experiences, practices or preferences. During the fall of 2010, the male cadet asked the offender to stop such practice, and the latter did for some months. But at the beginning of the year 2011, the offender engaged in the same type of behaviour. From February to May 2011, the offender's interactions with the male cadet became more explicit and ultimately involved touching for sexual purpose by Captain Moriarity on the male cadet at three different times on a defence establishment, while on duty.

[25] The third incident ended up with a fight where the offender threatened the male cadet that he would make his life hell. After that, no further interaction occurred between both of them.

[26] On 25 August 2011, the offender was arrested and released with conditions on the same day. Charges were laid in February 2012, and it was reported in several media outlets during the same month. As a consequence, his employer put a final end to his employment and he was evicted by his landlord. The offender was shunned by several of his friends and acquaintances.

[27] The offender has been seeing a counsellor in the Victoria area since the charges were laid against him in February 2012. He has been accepted to the Business Administration Program at Camosun College. He works part time. He intends to seek specialized sex offender treatment and counselling from Dr Monkhouse in Victoria.

[28] The psychological risk assessment report written by a psychologist, Dr Bruce Monkhouse, and dated 26 November 2012, was filed by the offender and provided the court with the following additional facts:

a. Captain Moriarity self identified as bi-sexual for some years. He needs to continue to work on his insecurity and confusion in regard to his sexual orientation.

b. Captain Moriarity is not sexually attracted to children or adolescents and the situation with the two victims was unique.

c. Captain Moriarity takes full responsibility for what happen and he does not try to minimize the damage caused to the victims. He feels a great deal of remorse and guilt for his misconduct.

d. Captain Moriarity has taken steps to deal with his risk factors and he has planned to participate in additional counselling as long as it would be necessary.

e. the result of the current risk assessment indicates that Captain Moriarity is accurately assessed as being a low moderate risk for sexual re-offending.

f. Captain Moriarity is not an imminent danger to the public and more specifically to children or adolescents. He can be managed in the community safely but needs to participate in psychological and/or sexual offender treatment to address his underlying criminogenic factors.

[29] In the Court of Appeal of Québec's decision in *R v. L.(J.J.)*, 1998 CANLII 12722 (QCCA), at pages 4 to 7, Justice Otis, writing for the court, listed a series of factors characterizing the criminal responsibility of an offender with regard to passing sentence for sexual offences, including the following:

a. the nature and intrinsic gravity of the offences which is affected by, in particular, the use of threats, violence, psychological threats and manipulation;

b. the frequency of the offences and the time period over which they were committed;

c. the abuse of trust and the abuse of authority which are involved in the relationship between the offender and the victim;

d. the disorders underlying the commission of the offences: the offender's psychological difficulties, disorders and deviancy, intoxication;

e. the offender's previous convictions: proximity in time to the offence charged and the nature of the previous offences;

f. the offender's behaviour after the commission of the offences: confessions, collaboration in the investigation, immediate involvement in a treatment programme, potential for rehabilitation, financial assistance if necessary, compassion and empathy for the victims;

g. the time between the commission of the offences and the guilty verdict as a mitigating factor depending upon the offender's behaviour, the offender's age, social integration and employment, commission of other offences;

h. the victim: gravity of the attack on his or her physical or psychological integrity reflected by, in particular, age, the nature and extent of the assault, the frequency and duration of the assault, the character of the victim, his or her vulnerability (mental or physical handicap), abuse of trust or authority, lingering effects.

[30] There are also some other factors that are not listed, such as the existence or absence of premeditation, the fact there was consumption of alcohol, the delay to proceed with the charge. This is not a thorough list and some other factors may always be considered.

[31] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors. The court considers as aggravating:

a. the objective seriousness of the offences. You were found guilty by this court of two offences laid in accordance with section 130 of the *National Defence Act* for having touched, for a sexual purpose, a young person towards whom you were in a position of authority, contrary to paragraph 153(1)(*a*) of the *Criminal Code*. The objective seriousness of this offence speaks for itself, given that there is a minimum punishment of 45 days' imprisonment and a maximum punishment of 10 years' imprisonment, reflecting the repudiation and aversion that Canadian society attaches to the commission of such an offence. You were also found guilty of an offence punishable under section 130 of the *National Defence Act* for having committed a sexual assault contrary to section 271 of the *Criminal Code*. This offence is punishable by imprisonment for a term not exceeding ten years. Finally, you were found guilty of an offence punishable under section 130 of the *National Defence Act* for having invited to sexual touching contrary to section 152 of the *Criminal Code*. This offence is punishable by a minimum punishment of 45 days' imprisonment and a maximum punishment of 10 years' imprisonment.

b. secondly, the subjective seriousness of the offenses, which consists of three aspects. The frequency and the context of the offences. You committed multiple acts over a significant period of time, on two victims, on defence establishments while on duty. None of these incidents occurred from an unexpected situation, but from purposeful and deliberate planned actions.

c. your insecurity and your confusion obscured your judgment to the point that you failed completely with regards to the relationship that was developing between you and the victims. On one side, you entered into a romantic and sexual relationship with a female cadet while your experience in the cadet movement, your training as an officer, including your training on prohibited relationships between staff and the cadets

themselves should have been sufficient for you to understand that you took advantage of a vulnerable young person and you were committing a breach of trust toward her. On the other side, you tried to enter into another romantic and sexual relationship with a male cadet of your unit by using and abusing of your authority to achieve and satisfy your own desire. Moreover, you abused the trust that was placed in you by your superiors, the parents and the members of Canadian society in general, which has specific expectations as to the respect of the cadets' mission.

d. clearly your actions had a huge impact on the victims. First, the male cadet had to physically enter in a fight with you in order for you to understand that enough was enough. He had to push you back more than once in order for you to respect his physical and psychological integrity. Concerning the female cadet, she still copes with the events. She feels betrayed and instead of developing and finding confidence in her after her passage in the cadet movement, she is still trying to develop some kind of self-confidence that would make her life better. She put all the trust she could have in you and you let her down.

[32] There are also mitigating factors that I considered:

a. your admissions and the fact that you expressed regret for what you did to both victims must be considered. It disclosed that you are taking full responsibility for what you did.

b. the absence of any annotation on your conduct sheet. So there is no indication of the commission of any similar offence, military offence or criminal offence, in relation or not to what happened

c. the unlikelihood that such an incident would reoccur because of:

i. the result of the current risk assessment indicates that you are accurately assessed as being a low moderate risk for sexual re-offending.

ii. the fact that you are not sexually attracted to children or adolescents and the situation with the two victims was a unique set of circumstances.

iii. the fact that you are not an imminent danger to the public and more specifically to children or adolescents.

iv. your commitment to take steps to deal with your risk factors and the fact that you planned to participate in additional counselling as long as it would be necessary.

[33] The court must therefore impose the punishment of imprisonment on the offender, both because it is necessary to ensure the respect of the law and the maintenance of military discipline consistent with the military case law developed on the subject and because it is required in accordance with the effects of the combination of paragraph 130(2)(*a*) of the *National Defence Act*, which provides for the imposition of the minimum punishment prescribed in the applicable provision of the *Criminal Code*, and sections 152 and 153 of the *Criminal Code*, which provides for the mandatory imposition of a sentence of imprisonment for a minimum term of 45 days.

[34] The question now is what the duration of such a sentence of imprisonment should be to ensure the respect of the law and to maintain discipline.

[35] The court recognizes that, as a matter of parity on sentence as suggested by the prosecutor, case law indicates clearly that such offences call for a sentence of imprisonment that goes from six to eighteen months. In these circumstances, the joint submission on this aspect clearly falls in that range.

[36] It has been suggested that the court, in addition to the sentence of imprisonment, impose on the offender the sentence of reduction in rank to the rank of second lieutenant.

[37] In the Court Martial Appeal Court decision of *R v Fitzpatrick*, [1995] C.M.A.J. No. 9, Judge Goodfellow described at paragraph 31 the nature of such a sentence:

> The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, plus social and professional standing loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence.

[38] Justice Bennett also expressed clearly the meaning of such a sentence, when she said in the Court Martial Appeal Court decision of *Reid v. R.; Sinclair v. R.*, 2010 CMAC 4, at paragraph 39:

> A reduction in rank is an important tool in the sentencing kit of the military judge. It signifies more effectively than any fine or reprimand that can be imposed the military's loss of trust in the offending member. That loss of trust is expressed in this case through demotion to a position in which the offenders have lost their supervisory capacity.

[39] So, reduction in rank is a purely military sentence that reflects the loss of trust in the offending member. As indicated at section 140.2 of the *National Defence Act*, it can be imposed as an accompanying punishment to the one of imprisonment.

[40] In the particular set of circumstances of this affair, it is well known that around the time of the commission of the offences, the offender was appointed as the Deputy Commanding Officer of his unit and was designated to become the corps' Commanding Officer. I am of the opinion that in order to reflect the lost of trust in the leadership of a person occupying such a position and having committed these offences, the combination

of the punishment of reduction in rank with the one of imprisonment appears reasonable in the circumstances of this case. It would express the lost of trust from the military community in the offender's leadership and in his capacity to occupy such positions as the Deputy Commanding Officer and Commanding Officer of a unit, while circumstances leading to the laying of charges before this court occurred.

[41] Interestingly enough, the parties also suggest imposing the punishment of dismissal to the offender as an accompanying punishment to the one of imprisonment. On that issue, I indicated to the parties that I was considering departing from that part of their joint submission.

[42] As I explained to them, I was not convinced that such punishment would be appropriate in the circumstances of this case. While reduction in rank would be imposed, from my perspective, imposing dismissal would go beyond what it is reasonably required in this case. I considered that the offender's loss of his civil employment and the eviction from his apartment once the laying of charges was made public have acted as a denunciating and deterrent effect on him. Social disapproval of his acts was clearly expressed through those actions. The need to do it again from a pure military perspective did not seem to exist, regarding all the aggravating and mitigating factors considered by this court.

[43] At the end of the day, as with reduction in rank, dismissal is a unique and purely military punishment that may be imposed alone or in conjunction with imprisonment. I questioned the necessity for the court to impose the release of the offender from the Canadian Forces. It appeared to me that the objectives of denunciation and general deterrence were well reflected in the condemnation to imprisonment, the length of it and by the reduction in rank of the offender. Imposing dismissal might bring the sentence beyond what it is reasonably required in the circumstances of this case.

[44] However, after giving an opportunity to the parties to provide me additional submissions, I did now understand from them that in addition to reflect the sentencing objectives from a criminal perspective, it is suggested to me that the particular set of circumstances in this case calls for a clear application of the same objectives from a military discipline perspective. The combination of both perspectives then ended up with the suggestion made.

[45] Dismissal would then reflect denunciation of the striking failure by a commissioned member of the Canadian Forces in the fulfilment of his duties and responsibilities as well as his betrayal of the trust vested in him by the Canadian Forces, the Cadet movement, his chain of command and his subordinates. I agree with counsel that in addition to the sentence of incarceration, the sentence to be imposed should focus also on the violation of the role and the responsibilities of a CIC officer put in a key position of trust. The combination of reduction in rank and dismissal would then bring at a higher level such denunciation.

[46] The sentence of dismissal will have, amongst its direct consequences, two very important effects: Firstly, your item of release from the Canadian Forces will no longer

mentions "honourably release," but "misconduct". Secondly, it will also indicate that persons who seriously betray the trust vested in them by knowingly abusing the confidence, the physical integrity of young persons put under their responsibility no longer deserve the privilege of leading young persons in the Cadet movement and will lose such privilege.

[47] A just and equitable sentence should take into account the gravity of the offence and the offender's degree of responsibility in the specific context of the case. Accordingly, the court will accept the recommendation made by counsel to sentence you to imprisonment for a term of 12 months, to dismissal of Her Majesty's service and to reduction in rank to the rank of second lieutenant, given that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[48] In accordance with section 196.14 of the *National Defence Act*, considering that the offences for which I have passed sentence are all primary designated offences within the meaning of section 196.11 of the *National Defence Act*, I order, as indicated on the attached prescribed form, that the number of samples of bodily substances that is reasonably required be taken from Captain Moriarity for the purpose of forensic DNA analysis.

[49] In accordance with section 227.01 of the *National Defence Act*, and considering that the offences for which I have passed sentence are designated offences within the meaning of section 227 of the *National Defence Act*, I order you, as appears from the attached regulation form, to comply with the *Sex Offender Information Registration Act* for life.

[50] I have also considered whether this is an appropriate case for a weapons prohibition order, as stipulated under section 147.1 of the *National Defence Act*. In my opinion, such an order is neither desirable nor necessary for the safety of the offender or of any other person in the circumstances of this trial, particularly in light of the criteria applicable under section 109 of the *Criminal Code* in the context of an offence of sexual abuse. Even though the above offence carries a 10 year maximum sentence of imprisonment, I am of the opinion that in the commission of these offences, violence against a person was not used, threatened or attempted and I will not make an order to that effect.

DISPOSITION

FOR THESE REASONS, THE COURT:

[51] **SENTENCES** you to imprisonment for a term of 12 months, to dismissal from Her Majesty's service and to reduction in rank to the rank of second lieutenant.

[52] **ORDERS** that the number of samples of bodily substances that is reasonably required be taken from Captain Moriarity for the purpose of forensic DNA analysis.

[53] **ORDERS** you to comply with the *Sex Offender Information Registration Act* for life.

Counsel:

Lieutenant-Colonel S. Richards, Canadian Military Prosecutions Service
Counsel for Her Majesty, the Queen

Major S. Collins, Captain Bruce, and Lieutenant-Commander M. Létourneau,
Directorate of Defence Counsel Services
Counsel for Captain D.J. Moriarity