Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140415

Docket: CMAC-553

Citation: 2014 CMAC 5

CORAM: **BLANCHARD C.J.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PAUL WEHMEIER

Respondent

Heard at Ottawa, Ontario, on November 22, 2013

Judgment delivered at Ottawa, Ontario, on April 15, 2014.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT BY THE COURT

I. Introduction

[1] This is an appeal from the decision of Chief Military Judge Mario Dutil (the Chief Military Judge), dated June 10, 2012, by which the Chief Military Judge ordered that the proceedings against the respondent be terminated on the ground that the decision to proceed in

the military courts was an act of prosecutorial discretion by the Director of Military Prosecutions (DMP) amounting to an abuse of process.

[2] For the reasons that follow, the appeal should be dismissed.

II. Facts

[3] Before this Court, the following facts are undisputed. Only a brief summary is necessary.

[4] The respondent, Paul Wehmeier, a former Canadian Forces (hereafter CF) member, was employed as a "peer educator" at a "third location decompression center" operated by the CF in Germany. The center was set up to assist CF members transitioning out of the operational theatre in Afghanistan to reintegrate into Canadian society. Peer educators were former CF members who participated in briefings with the returning soldiers and, "as they shared common experiences, were expected to answer the soldiers' questions on a personal level": DMP's memorandum of fact and law at paragraph 5.

[5] The respondent was hired for a term of approximately two months beginning in March 14, 2011.

[6] On March 19, 2011, the respondent attended a beer festival in Bitburg, Germany, where he allegedly became intoxicated and committed offences against three members of the CF. On March 24, 2011, ten days into his contract and five days after the alleged incident, the respondent was returned to Canada.

[7] The Commanding Officer of the Second Line of Communications Detachment, Germany in his report on the incident, expressed concern about the serious nature of the allegations and their negative impact on the victim and on discipline and morale of the CF: Appeal Book, Vol. 2, p. 307 at paragraph 3. As a result, on August 19, 2011, the Commander Canadian Operational Support Command recommended to the DMP that charges be preferred and tried by court martial as soon as possible: Appeal Book, Vol. 2, p. 310 at paragraph 6.

[8] The allegations were investigated by the Canadian Military Police, following which the three following charges were preferred under section 130 of the *National Defence Act*, R.S.C., 1985, c. N-5 (*NDA*) on February 16, 2012:

FIRST CHARGE Section 130 N.D.A.	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*. *Particulars*: In that he, on or about 19 March 2011, at Bitburg, Germany, while employed as a Peer Educator, did commit a sexual assault upon Cpl S.R.
SECOND CHARGE Section 130 N.D.A.	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, UTTERING THREATS, CONTRARY TO PARAGRAPH 264.1(1)*(a)* OF THE *CRIMINAL CODE*.

	Particulars: In that he, on or about 19 March 2011, at Bitburg, Germany, while employed as a Peer Educator, did knowingly utter a threat to Cpl KC to cause death to Cpl K.C.
THIRD CHARGE Section 130 N.D.A.	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, ASSAULT, CONTRARY TO SECTION 266 OF THE *CRIMINAL CODE*.
	Particulars: In that he, on or about 19 March 2011, at Bitburg, Germany, while employed as a Peer Educator, did commit an assault on Cpl D.L.

[9] A Standing Court Martial was convened on May 29, 2012. The respondent brought two preliminary applications, both of which were dismissed by the Chief Military Judge. In light of these outcomes, the respondent requested a transfer of the proceedings to the civilian authorities; this request was denied by the DMP. The respondent then asked the DMP to justify the decision to proceed by Standing Court Martial. After initially refusing to provide further information, the DMP advised defence counsel that in light of the fact that the case was now before a court of competent jurisdiction, that the trial preparation was complete and the witnesses assembled and prepared, it was not in anyone's interest to withdraw the charges so as to refer the matter to the civilian authorities: Appeal Book, Vol. 2 at page 304.

[10] On June 6, 2012, the respondent brought a third application seeking a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*). The Chief Military Judge granted the application and terminated the proceedings instead of granting a stay. This decision is under appeal.

[11] For completeness, we have set out the relevant provisions of the *NDA* and the *Charter* below.

III. Legislation

National Defence Act, (R.S.C., 1985, c. N-5)

60. (1) The following persons are subject to the Code of Service Discipline:	60. (1) Sont seuls justiciables du code de discipline militaire:
[…]	[…]
(f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;	*f)* les personnes qui, normalement non assujetties au code de discipline militaire, accompagnent quelque unité ou autre élément des Forces canadiennes en service, actif ou non, dans un lieu quelconque;
61. (1) For the purposes of this section and sections 60, 62 and 65, but subject to any limitations prescribed by the Governor in Council, a person accompanies a unit or other element of the Canadian Forces that is on service or	61. (1) Pour l'application du présent article et des articles 60, 62 et 65 mais sous réserve des restrictions réglementaires, une personne accompagne une unité ou un autre élément des Forces canadiennes qui est en service, actif ou non, si, selon

active service if the person	le cas:
[…]	[…]
(b) is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council;	*b)* elle est logée ou pourvue d'une ration — à ses propres frais ou non — par cet élément ou unité en tout pays ou en tout lieu désigné par le gouverneur en conseil;
130. (1) An act or omission:	*130. (1)* Constitue une infraction à la présente section tout acte ou omission :
(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	*a)* survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale;
(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,	*b)* survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale.
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).
(2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,	(2) Sous réserve du paragraphe (3), la peine infligée à quiconque est déclaré coupable aux termes du paragraphe (1) est :
(a) if the conviction was in respect of an offence	*a)* la peine minimale prescrite par la disposition législative correspondante, dans le cas d'une infraction :
(i) committed in Canada under Part VII, the *Criminal Code* or	(i) commise au Canada en violation de la partie VII de la

any other Act of Parliament and for which a minimum punishment is prescribed, or

présente loi, du *Code criminel* ou de toute autre loi fédérale et pour laquelle une peine minimale est prescrite,

(ii) committed outside Canada under section 235 of the *Criminal Code*,

(ii) commise à l'étranger et prévue à l'article 235 du *Code criminel;*

(b) in any other case,

b) dans tout autre cas :

(i) impose the punishment prescribed for the offence by Part VII, the *Criminal Code* or that other Act, or

(i) soit la peine prévue pour l'infraction par la partie VII de la présente loi, le *Code criminel* ou toute autre loi pertinente,

(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

(ii) soit, comme peine maximale, la destitution ignominieuse du service de Sa Majesté.

(3) All provisions of the Code of Service Discipline in respect of a punishment of imprisonment for life, for two years or more or for less than two years, and a fine, apply in respect of punishments imposed under paragraph (2)*(a)* or subparagraph (2)*(b)*(i).

(3) Toutes les dispositions du code de discipline militaire visant l'emprisonnement à perpétuité, l'emprisonnement de deux ans ou plus, l'emprisonnement de moins de deux ans et l'amende s'appliquent à l'égard des peines infligées aux termes de l'alinéa (2)*a)* ou du sous-alinéa (2)*b)*(i).

(4) Nothing in this section is in derogation of the authority conferred by other sections of the Code of Service Discipline to charge, deal with and try a person alleged to have committed any offence set out in sections 73 to 129 and to impose the punishment for that offence described in the section prescribing that offence.

(4) Le présent article n'a pas pour effet de porter atteinte aux pouvoirs conférés par d'autres articles du code de discipline militaire en matière de poursuite et de jugement des infractions prévues aux articles 73 à 129.

273. Where a person subject to the Code of Service Discipline does any act or omits to do anything while outside Canada which, if done or omitted in Canada by that person, would be an offence punishable by a civil court, that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.	273. Tout acte ou omission commis à l'étranger par un justiciable du code de discipline militaire et qui constituerait, au Canada, une infraction punissable par un tribunal civil est du ressort du tribunal civil compétent pour en connaître au lieu où se trouve, au Canada, le contrevenant; l'infraction peut être jugée et punie par cette juridiction comme si elle avait été commise à cet endroit, ou par toute autre juridiction à qui cette compétence a été légitimement transférée.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that	(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été

infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

IV. Procedural History

[12] At the outset of the proceedings, counsel for the respondent made an application for a plea in bar of trial on the basis that the Standing Court Martial lacked jurisdiction because the respondent was not subject to the Code of Service Discipline (CSD) pursuant to paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA*.

[13] The Chief Military Judge concluded that the respondent was subject to the CSD at the time of the alleged offences as a person accompanying a unit or other element of the CF and dismissed the respondent's plea in bar of trial: *R. v. Wehmeier*, 2012 CM 1005 (*Wehmeier 1*) at paragraphs 14, 17.

[14] On June 4, 2012, counsel for the respondent brought a second application challenging the constitutionality of paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* as being overbroad and therefore violating the respondent's rights under section 7 of the *Charter*. The respondent sought a declaration that the provisions were of no force or effect pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[15] On June 5, 2012, the Chief Military Judge dismissed the application finding that the respondent had not met his burden of proof that the provisions are overbroad and that some applications would be arbitrary and disproportionate: *R. v. Wehmeier*, 2012 CM 1006 (*Wehmeier 2*) at paragraph 28.

[16] In concluding as he did, the Chief Military Judge relied on the views expressed by the Associate Minister of National Defence on February 11, 1954 (see: House of Commons Debates, 22nd Parl., 1st Sess., Vol. II (11 February, 1954) at page 2010 (Hon. Ralph Campney)), and found that the purpose and objective of paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* were notably to ensure that persons accompanying the CF would be subject to some law at all times: *Wehmeier 2* at paragraph 22.

[17] According to the Chief Military Judge, the original intent of Parliament was for Canada to retain primary jurisdiction over CF members and the persons who accompany them in order to protect their interests and have them tried according to our law. Citing the Associate Minister of National Defence, he concluded that the provisions were intended to limit the jurisdiction of military courts such that jurisdiction would only be exercised if it was "absolutely essential or in the interests of the civilians themselves that they do so": *Wehmeier 2* at paragraph 24. The definition provided for in section 61 of the *NDA* was not arbitrary or disproportionate, as it needed to cover a multitude of situations. The Chief Military Judge therefore found that the provisions were not grossly disproportionate to the state interest the legislation seeks to protect: *Wehmeier 2* at paragraph 25.

V. Decision under Review

[18] The respondent then made a third application in which he argued that the decision of the DMP to prefer charges against a civilian subject to the CSD violated section 7 of the *Charter* because it engaged his liberty interests in a manner that was arbitrary and disproportionate, and thus not in accordance with the principles of fundamental justice. The respondent argued that the DMP's conduct amounted to an abuse of process.

[19] In his reasons, the Chief Military Judge began by reiterating his legal analysis in *Wehmeier 2*. As mentioned above, he found that paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* were constitutional. The learned judge specified that he had reached that outcome mainly because he was satisfied that the purpose and objective was to limit the jurisdiction of military courts so as to only exercise jurisdiction when "absolutely essential or in the interests of the civilians themselves that they do so": *R. v. Wehmeier*, 2012 CM 1007 (*Wehmeier 3*) at paragraph 31.

[20] The learned judge stated the decision to prefer charges was an act of prosecutorial discretion that did not amount to an abuse of process: *Wehmeier 3* at paragraph 38. Further, he found that the decision to continue with the Standing Court Martial and not withdraw the charges was also an act of prosecutorial discretion, subject only to judicial review for abuse of process: *Wehmeier 3* at paragraph 33. When analyzing the doctrine of abuse of process, the Chief Military Judge first found that the respondent had not established, on a balance of probabilities, that being

subject to a different judicial process i.e. a trial before a military as opposed to a civilian court would affect the fairness of trial: *Wehmeier 3* at paragraph 34.

[21] However, the Chief Military Judge found that this case fell within the "residual category", where the abuse causes prejudice to the integrity of the judicial system. He concluded that there was evidence to support an inquiry into prosecutorial discretion. In arriving at this conclusion, the Chief Military Judge relied on the following evidence: (1) the DMP's denial of the respondent's request to transfer the matter to civilian authorities; (2) the DMP's refusal to disclose further information with regard to the rationale behind the decision to continue the prosecution in the military courts; (3) the DMP's refusal to review his decision to continue with the proceeding in light of the decision in *Wehmeier 2* regarding the purpose and objective of paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA*: *Wehmeier 3* at paragraph 38. The Chief Military Judge then proceeded to inquire into the exercise of prosecutorial discretion by the DMP.

[22] In his inquiry, the Chief Military Judge considered the circumstances surrounding the exercise of prosecutorial discretion and determined that, in light of the DMP's conduct, the decision to continue with a military prosecution amounted to an abuse of process. In coming to this conclusion, the Chief Military Judge relied on the evidence which justified his inquiry into prosecutorial discretion, as described above, as well as the DMP's refusal during the proceeding to provide any explanation as to the rationale for his decision to continue with the prosecution within the military justice system. He also found that the DMP's statement that it was not in anyone's interest, including the respondent's, to withdraw the charges and the initial legitimate reasons for preferring the charges, were insufficient to justify continuing the prosecution before

the military courts in light of his finding on the legislative intent. Relying heavily on his conclusion in *Wehmeier 2*, the Chief Military Judge found that the DMP's decision to continue with the proceedings following the decision in *Wehmeier 2* was inconsistent with the Court's conclusion that "the Canadian Forces will not in fact exercise jurisdiction over civilians unless it is absolutely essential or in the interests of the civilians themselves that they do so": *Wehmeier 3* at paragraph 41. The Chief Military Judge stated that the DMP had had every opportunity to provide some explanation and refused, a fact that weighed heavily against the DMP and amounted "to an abuse of process to the integrity and reputation of the military justice system": *Wehmeier 3* at paragraph 42.

[23] A stay of proceedings was deemed unsatisfactory and therefore, the Chief Military Judge concluded that the appropriate remedy in the circumstances was to terminate the proceedings of the Standing Court Martial: *Wehmeier 3* at paragraph 43.

[24] The Chief Military Judge turned only briefly to the respondent's argument that prosecuting Mr. Wehmeier before a military tribunal was grossly disproportionate, deciding that he lacked an adequate record to decide the issue. His decision does not address the respondent's argument that the arbitrary character of the proceedings against him before the Standing Court Martial are a violation of his rights under section 7 of the *Charter*.

VI. Issues

[25] This appeal raises the following issues:

(1) Did the Chief Military Judge err in concluding that the DMP's conduct amounted to an abuse of process to the integrity and reputation of the military justice system?

(2) Are the proceedings against the respondent before the Standing Court Martial a breach of his rights not to be deprived of liberty except in accordance with the principles of fundamental justice as provided in s. 7 of the *Charter*?

VII. Analysis

(1) Did the Chief Military Judge err in concluding that the DMP's conduct amounted to an abuse of process to the integrity and reputation of the military justice system?

(a) *Prosecutorial Discretion*

[26] Prosecutorial discretion is a fundamental principle of our criminal justice system in which it is viewed as a constitutional principle. Prosecutors must be able to exercise their authority to initiate, continue or cease prosecutions independently. The law respects this discretion by mandating that courts cannot and should not interfere with prosecutorial discretion, providing it is exercised in good faith and in the interests of justice.

[27] The limited oversight of prosecutorial discretion is grounded in the principles of the separation of powers and the rule of law under the Constitution: *R. v. Power*, [1994] 1 S.C.R. 601 (*Power*) at page 621; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 (*Krieger*) at paragraph 32. In *Power*, writing for the majority, L'Heureux-Dubé J. articulated the restricted role of the courts in reviewing the exercise of prosecutorial discretion: *Power* at page

627. The Supreme Court later reaffirmed that the court's role is not to supervise parties' decision-making processes: *Krieger* at paragraph 32.

[28] The Supreme Court went on to add that "prosecutorial discretion" was a term of art. It was defined as "the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence": *Krieger* at paragraph 43.

[29] Not every discretionary decision falls within the scope of prosecutorial discretion. What the courts protect are "the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for" [emphasis in the original]: *Krieger* at paragraph 47. This definition of core prosecutorial discretion was confirmed in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566 (*Nixon*) at paragraph 21. Once a decision is found to be within this core, as opposed to having to do with tactics or conduct before the Court, "the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for "malicious prosecution"" (*Krieger* at paragraph 49 citing *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Nixon* at paragraph 30. Tactics and conduct before the Court, on the other hand, are within the inherent jurisdiction of the Court to control its own processes.

[30] The Supreme Court cautioned that an evidentiary foundation was required to determine whether an inquiry was warranted in light of the disinclination to review prosecutorial discretion. Unless there is an evidentiary foundation supporting the allegation of abuse of process resulting from an exercise of prosecutorial discretion, courts should decline to proceed with a review:

Nixon at paragraphs 60 and 65. Therefore, if the act falls within the core elements of prosecutorial discretion, a preliminary threshold must be established. If this threshold is not met, the analysis ends here. If the threshold is met, the court can then proceed with the inquiry into prosecutorial discretion to determine whether the exercise of discretion amounts to an abuse of process.

[31] Although the penal military justice system possesses its own system of prosecution, defence and tribunals, the role played by the DMP is similar to that exercised by the Attorney General. We are satisfied on the record before us that, while there are differences between the position of the Attorney General and the DMP (see: *R. v. JSKT*, 2008 CMAC 3, [2008] C.M.A.J. No. 3 at paragraph 98), these differences do not justify the conclusion that a different scope of prosecutorial discretion applies to the DMP. The principles articulated in the jurisprudence set out above with regard to the nature of the role of the prosecutor, prosecutorial discretion and the circumstances, which may warrant the review of a prosecutorial decision, find application to the DMP and the exercise of prosecutorial discretion by the DMP.

(b) *Abuse of Process*

[32] As mentioned above, prosecutorial discretion is subject to a high level of deference. In light of the panoply of prosecutable crimes, the prosecutor has a wide-ranging discretion in bringing, continuing and dismissing charges, recommending other forums or appropriate sentences. However, acts of prosecutorial discretion are not immune from judicial review as they are subject to the abuse of process doctrine: *Nixon* at paragraphs 31 and 64.

[33] The definition and application of the doctrine are an exercise in balancing societal and individual concerns: *Nixon* at paragraph 38. In *R. v. O'Connor*, [1995] 4 S.C.R. 411 (*O'Connor*), and again in *Nixon*, the Supreme Court recognized two forms of abuse of process which would be caught by section 7 of the *Charter*: "(1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that 'contravenes fundamental notions of justice and thus undermines the integrity of the judicial process'": *Nixon* at paragraph 36 citing *O'Connor* at paragraph 73. The latter is referred to as the residual category.

[34] In *R. v. Babos*, 2014 SCC 16 (*Babos*), Moldaver J., for the majority, took the opportunity to revisit the residual category, when he said at paragraph 35:

> By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system.

[35] The doctrine of abuse of process is a safeguard meant to protect against conduct affecting the fairness of the trial and conduct undermining the integrity of the judicial system. Cases of this nature are exceptional and rare; therefore courts must ensure this high threshold has been met before "second-guessing" the motives and reasons underlying the decision-making process: see also *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339 at paragraphs 6 and 45-48.

(c) *Application to the Case*

[36] The Chief Military Judge correctly articulated the applicable legal test in that, in the absence of a threshold determination, courts should not undertake a review of prosecutorial discretion. We are satisfied that the DMP's decision to prefer charges and the decision to continue with a Standing Court Martial were his alone to make and come within the core of prosecutorial discretion. These are decisions as to whether a prosecution should be brought and continued and what charges the prosecution ought to be for: *Krieger* at paragraph 47. As such, those decisions should not be interfered with unless there is a sufficient evidentiary basis to put the exercise of that discretion in question.

[37] The learned judge went on to conclude that the preliminary threshold had been met. For the reasons that follow, we find that the Chief Military Judge erred in concluding first, that the threshold showing had been met and second, that the DMP's conduct amounted to an abuse of process.

[38] In our view, the Chief Military Judge erred in finding that the applicant's request for justification for proceeding before the military courts received no response. According to the record, the DMP responded to this first request and was unwilling to have the matter transferred based on the timeliness of the request, the efficient use of court resources and the expeditious resolution of the charges: see E-mail correspondence, Appeal Book, Vol. 2, page 304. When receiving a request to transfer a matter to the civilian authorities, the DMP is under no obligation to respond favourably.

[39] The e-mail requesting disclosure of information governing the decision was sent on June 5, 2012. The DMP reviewed the request and denied it on the grounds that the decision to prefer charges fell within the core of prosecutorial discretion and that certain information was covered by work-product privilege, Crown immunity and solicitor-client privilege: see Appeal Book, Vol. 2, at page 305. Before this Court, the respondent did not challenge these claims of privilege. Further, on that same day, the DMP did provide further information into the rationale behind his decision to continue with the proceedings: see Appeal Book, Vol. 2, page 304.

[40] Lastly, the alleged failure to comply with the Chief Military Judge's reasoning in *Wehmeier 2* is not a proper basis upon which to determine if the preliminary threshold has been met, nor is it evidence of arbitrariness on the part of the DMP. The DMP relied on the previous rulings that, on June 1, 2012, the Chief Military Judge found that the respondent was subject to the CSD and on June 5, 2012, he concluded that paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* were constitutional and dismissed the second application. In light of these findings, the DMP's decision to continue with the proceedings cannot be said to be arbitrary so as to warrant further inquiry into the exercise of prosecutorial discretion.

[41] It appears that the abuse of process claimed by the respondent stems from the DMP's denial to transfer the matter to civilian authorities and the dissatisfaction with the reasons provided for such refusal. The failure to grant the respondent's request and the alleged failure to comply with the reasoning of a previous motion do not amount to the preliminary threshold showing warranting further judicial review. On the record before us and in the context of this

preliminary motion, there was nothing improper in the considerations relied on by the DMP in making his decision to continue the proceedings.

[42] Even if our finding on the preliminary threshold showing is incorrect, in this case, there is no evidence to support a finding of abuse of process.

[43] In our view, the Chief Military Judge erred in reaching the conclusion that the DMP could have provided some explanation and chose not to do it. He failed to consider that "[t]here is no freestanding principle of fundamental justice requiring that the Crown justify the exercise of its discretion to the trial court": *R. v. Gill*, 2012 ONCA 607, 96 C.R. (6th) 172 (*Gill*) at paragraph 75. The DMP did not have a constitutional obligation to provide reasons for his decision: *Gill* at paragraph 77.

[44] The Chief Military Judge's rationale was that this prosecution should not have continued because it was contrary to the purpose and objective of Parliament as he had articulated in *Wehmeier 2*. With respect, the continuation of the proceedings after the decision in *Wehmeier 2* is not evidence of prosecutorial misconduct or flagrant impropriety. The factual circumstances that supported the decision to prosecute had not fundamentally changed. The Chief Military Judge could not rely on his prior conclusion in *Wehmeier 2* to establish an abuse of process on the motion before him. In these circumstances, there is no evidence of prosecutorial misconduct, flagrant impropriety, or malicious prosecution on behalf of the DMP. The state has not "engaged in conduct that is offensive to societal notions of fair play and decency" so that "proceeding with

a trial in the face of that conduct would be harmful to the integrity of the justice system": *Babos* at paragraph 35.

[45] As a result, the Chief Military Judge's conclusion that there had been an abuse of process in the exercise of the DMP's prosecutorial discretion cannot stand. But that is not the end of the matter, for even if the DMP was entitled to proceed as he did, it does not follow that the resulting proceedings were consistent with the principles of fundamental justice.

> (2) Are the proceedings against the respondent before the Standing Court Martial a breach of his rights not to be deprived of liberty except in accordance with the principles of fundamental justice as provided in s. 7 of the *Charter*?

[46] Before attending to the substance of the respondent's application, it useful to deal with a preliminary question which arises from the manner in which this matter has come before this Court.

[47] In Mr. Wehmeier's Notice of Application for a stay of proceedings, he identified the DMP's decision to prefer charges as the offending state action giving rise to a section 7 violation. However, the substance of his arguments regarding both arbitrariness and gross disproportionality attacked the constitutionality of the proceedings themselves and not simply the conduct of the DMP: see Appeal Book, Vol. 2, pp. 205-209. This conflation of these two legal doctrines appears to be based in Mr. Wehmeier's stated view that abuse of process and section 7 "have essentially been merged": Appeal Book, Vol. 2 at page 186. The prosecution then overwhelmingly concentrated its submissions on the abuse of process aspect of the application, and took the position that the challenge to the regularity of the proceedings before the Standing

Court Martial was, in substance, an attack on the exercise of prosecutorial discretion. It appears that the Chief Military Judge accepted this characterization of the issue.

[48] In our view, this approach discloses a misconception of the remedies available to the respondent. It is true that an act of prosecutorial discretion that results in an abuse of process can amount to a breach of a defendant's rights under section 7 of the *Charter*: see *Nixon* at paragraphs 1-5. However, it does not follow that every section 7 challenge to proceedings that flow from a prosecutor's decision must be founded on abuse of process. Prosecutorial decisions made in good faith may result in proceedings which are nonetheless constitutionally flawed. It cannot be the case that a respondent is unable to challenge those proceedings on substantive grounds simply because the prosecutor's exercise of his discretion in initiating those proceedings is beyond reproach.

[49] An example may make the point clearer. A prosecutor decides to bring a matter to trial outside the time frame contemplated by the jurisprudence on the right to a trial within a reasonable time as guaranteed by section 11 of the *Charter*. The prosecutor is of the view that the circumstances of the case are such that the delay either does not impair the accused's right or that the delay is due solely to the conduct of the accused himself. At trial, the defence challenges the prosecutor's exercise of his discretion, alleging abuse of process. The trial judge hears the evidence and decides that the prosecutors' discretion to proceed with the matter was properly exercised. It cannot be seriously contended that the defence would then be precluded from arguing the merits of the section 11 challenge to the proceedings. The principle of prosecutorial

discretion cannot shelter the fruit of the exercise of that discretion from review on substantive grounds.

[50] In our view, the respondent's argument was not addressed and was improperly subsumed under the heading of prosecutorial discretion. We believe that the interests of justice militate in favour of this Court deciding the issue rather than sending it back to the Chief Military Judge for his consideration. The events giving rise to the charges against the respondent occurred in 2011. It is in the respondent's interest as well as in the interests of justice to decide this question expeditiously so that if the matter is to proceed, it may do so without further delay.

[51] The respondent says that the proceedings against him engage his liberty interest under section 7 of the *Charter* because they expose him to the risk of imprisonment. We do not believe that this is particularly contentious and do not intend to say anymore about it.

[52] The respondent then relies upon the authority of *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 (*PHS*) for the proposition that the application of a law is not in accordance with the principles of fundamental justice if it is arbitrary or disproportionate in its effects: see *PHS* at paragraphs 129-132.

[53] The respondent says that the proceedings against him before the Standing Court Martial are arbitrary because they have no connection with the objectives which Parliament had when it enacted the provisions making certain civilians subject to the CSD. The respondent relies upon

the decision of the Supreme Court of Canada in *Chaoulli v. Québec (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 791, at paragraph 131 where the Court wrote:

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

[54] As noted earlier in these reasons, in *Wehmeier 2* the Chief Military Judge found that Parliament's objective in enacting paragraphs 60(1)*(f)* and 61(1)*(b)* of the *NDA* was that Canada retain primary jurisdiction over CF members and the persons who accompany them in order to protect their interests and have them tried according to our law and not according to foreign penal law. The provisions subjecting civilians to the CSD were intended to limit the jurisdiction of military courts such that jurisdiction would only be exercised if it was "absolutely essential or in the interests of the civilians themselves that they do so": *Wehmeier 2* at paragraph 24.

[55] In his memorandum of fact and law, the respondent reviews the particular needs of military discipline as it relates to accompanying civilians. He summarizes his conclusions at paragraph 51, a summary that we find correctly states Parliament's intent:

> The existence of Canadian military jurisdiction would allow the military to ensure the safety of our people abroad by affording it some enforceable control over civilians, help limit the reach of repressive foreign jurisdiction and extend the application of Canadian law and procedures to the civilians in foreign places. In all cases, Parliament's intent was that military jurisdiction would

> only be exercised over civilians accompanying the forces when it was absolutely necessary or in the best interests of the civilians themselves to do so.

Given that the respondent was repatriated to Canada within 5 days after the occurrence of the alleged offences, it cannot be asserted that his prosecution in the military courts is necessary to protect him from foreign penal jurisdiction.

[56] The Appeal Book contains a letter from the Commander, Canadian Operational Support Command, referring the respondent's file to the DMP. In it, the Commander states that:

> due to the serious nature of the alleged offences, the negative impact the alleged threat had on the victim, and the fact that the alleged offences occurred in a deployed setting while the accused was embedded with the CF and involved CF members with whom the accused was co-located, it is in the public interest and in the interest of the CF to proceed with the charges laid within the military justice system.
>
> Appeal Book, Vol. 2, p. 310

[57] To the extent that this can be considered the rationale for the prosecution of the respondent within the military justice system, it fails to explain why the considerations that it identifies would not be adequately served by prosecuting the respondent in the civilian criminal justice system. The rationale offered in the letter would be compelling if the respondent were still engaged with the CF and in contact, to a greater or lesser extent, with the victims of the conduct which gave rise to the laying of charges. Given that he is now permanently in Canada and removed from the CF environment, it is not obvious why prosecution before a military as opposed to a civilian court is necessary. In light of the respondent's circumstances, it is not sufficient to simply assert the public interest in having charges laid in the military justice system.

[58] As a result, we are satisfied that the prosecution of the respondent in the military justice system is arbitrary because it lacks any connection with the objectives sought to be achieved by making accompanying civilians subject to the CSD.

[59] The second element that must be shown to support the conclusion that proceedings are not in accordance with the principles of fundamental justice is that they have a disproportionate effect on the individual relative to the state's interest in the proceeding. In this case, the disproportionate effect arises from the respondent's loss of certain procedural rights if tried under the CSD as opposed to the *Criminal Code*, R.S.C., 1985, c. C-46 (*Criminal Code*). The rights which are not available under the CSD are the right to be tried by judge and jury, the right to have the prosecutor elect to proceed by summary conviction, and the right, if found guilty, to the full range of sentencing options in the Criminal Code including conditional sentences, probation and conditional and absolute discharge.

[60] While the rights in question are characterized as procedural, they are nonetheless substantial rights whose loss is liable to result in important differences in the treatment he receives in the military justice system as opposed to the civilian criminal justice system. The question, at this stage, is whether the respondent's loss of these rights can be justified by the state's superior interest in having the respondent tried in the military justice system rather than in the civilian criminal justice system.

[61] It is important to remember that the issue is not whether the respondent should be prosecuted at all but whether the interest in having him tried in the military justice system is

proportional to his loss of rights when tried in that system. The only evidence in the record on this point is the letter from the Commander, Canadian Operational Support Command, set out earlier in these reasons. When that letter is examined under this aspect, it is once again insufficient because it fails to address the need for prosecution in the military as opposed to the civilian justice system. In the absence of such a justification, we can only conclude that the effects of prosecuting the respondent in the military justice system are disproportionate. As a result, the respondent's prosecution is a breach of the respondent's right not to be deprived of his liberty except in accordance with the principles of fundamental justice contrary to section 7 of the *Charter*.

[62] We would point out that the result in this case is a function of the record before the Court. We should not be taken as saying that all prosecutions of civilians before the military courts necessarily result in a breach of their rights under s. 7 of the *Charter*. Each case stands to be decided on its own facts. We would say however that where a civilian makes a s. 7 argument based on the loss of procedural rights before the military courts, the onus shifts to the prosecution to justify proceeding before the military courts as opposed to the civilian criminal courts. It will then fall to the court to decide if the state interest in proceeding in the military courts is proportionate to the civilian's loss of procedural rights.

VIII. Remedy

[63] The relief requested by the respondent is a stay of proceedings before the Standing Court Martial. In his decision, the Chief Military Judge ruled that a stay of proceedings was not an appropriate remedy under subsection 24(1) of the Charter as such an extreme remedy could only

be granted in the clearest of cases. In addition, in the circumstances of this case, entering a stay of proceedings would preclude the possibility of trial in the civilian criminal courts since a stay of proceedings will support a plea of *autrefois acquit*: *R. v. Jewitt*, [1985] 2 S.C.R. 128. As a result, we concur in the Chief Military Judge's view that the appropriate remedy is a termination without adjudication of the proceedings against the respondent in the Standing Court Martial.

[64] Therefore, the appeal will be dismissed.

"Edmond P. Blanchard"
C.J.

"J.D. Denis Pelletier"
J.A.

"Johanne Trudel"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Commander J.B.M. Pelletier Major A.M. Tamburro	FOR THE APPELLANT
Major Alison Reed LCdr Marc Létourneau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Directorate of Military Prosecutions Ottawa, Ontario	FOR THE APPELLANT
Directorate of the Defence Counsel Services Ottawa, Ontario	FOR THE RESPONDENT