COURT MARTIAL

Citation: *R. v. Levi-Gould,* 2016 CM 4002

Date: 20160224
Docket: 201528

Standing Court Martial

Canadian Forces Base Halifax Courtroom
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Ordinary Seaman T.A. Levi-Gould, Applicant

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

DECISION ON AN APPLICATION BY THE ACCUSED CHALLENGING THE CONSTITUTIONALITY OF SUBSECTION 157(1) OF THE *NATIONAL DEFENCE ACT* AND SEEKING A DECLARATION OF INVALIDITY AND A STAY OF PROCEEDINGS ON THE BASIS OF VIOLATIONS OF SECTIONS 7, 8, 9 & 11(*b*) OF THE *CHARTER*.

(Orally)

INTRODUCTION

[1] The accused in this case was a junior sailor in the Royal Canadian Navy who failed to return to his ship following Christmas leave on 7 January 2014. With the exception of a short telephone conversation with a supervisor two days later, he had no contact with the Canadian Forces until arrested by the military police on 2 April 2015. During that nearly 15-month period, he was charged with the two offences of desertion and disobedience of a lawful command on which the proceedings before this court are based as evidenced from the charge sheet preferred on 3 September 2014. The accused was also administratively released from the Canadian Forces on 16 October 2014.

[2] Although the court is dealing today with a person who has been a civilian for over 16 months, the military jurisdiction over the accused is established by subsection 60(2) of the *National Defence Act* (*NDA*) given the alleged commission of the service offences in January 2014, while the accused was subject to the Code of Service Discipline. Also, for the purpose of these proceedings, the accused must be referred as Ordinary Seaman Levi-Gould as a result of the application of subsection 60(3) of the *NDA*, which deems the accused to have the same rank and status that he held prior to his release from the Canadian Forces. The application of these provisions has not been challenged by plea in bar or otherwise in these proceedings.

[3] What has been challenged when the proceedings of this Standing Court Martial began on 10 February 2016 is the constitutionality of the provision allowing arrest warrants to be issued by commanding or delegated officers. Also, violation of the accused's rights under the *Canadian Charter of Rights and Freedoms* was alleged on the facts of this case. Indeed, before the accused was asked to plead on the charges, defence counsel submitted an application under article 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) challenging the constitutionality of subsection 157(1) of the *NDA*, under which two commanding officers acted in issuing arrest warrants, and seeking a declaration that this provision is of no force or effect pursuant to section 52(1) of the *Constitution Act*, 1982. A Notice of Constitutional Question was filed and introduced as Exhibit M1-2 in relation to this challenge. The notice also includes allegations that the applicant's rights under sections 8 and 7 of the *Charter* were violated in this case by the issuance of the arrest warrants against him and that his rights under section 9 were violated by his arrest and subsequent detention under the second of those warrants. He also submits that his right to be tried within a reasonable time under section 11(*b*) of the *Charter* was breached. Even if the alleged violations by state actors were combined with allegations relating to the legislative provision in one notice of constitutional question, they engage different remedies and will be analysed separately.

THE FACTS

[4] The evidence relating to the application was introduced by both counsels by means of affidavits from their administrative assistants reflecting the content of their respective files as it pertains to the documents and steps taken by parties and others in relation to this file. Both parties agreed that the documents referred to and provided in support of these affidavits can be admitted for the truth of their content but that the print out of e-mail correspondence was introduced simply to show that the e-mails were sent but not to the truth of statements contained in those e-mails. *Viva voce* evidence was also heard. The applicant testified. For its part, the respondent called the commanding officer who issued the second warrant under which the applicant was arrested. Commander Druggett produced an Aide-Memoire as Exhibit M1-6 which is used by staff on ships outlining the steps to be taken in relation to absentees. Also, three military police witnesses were called to relate the events, from the issuance of the first arrest warrant on 8 January 2014 to the release of the accused from military custody on 8

April 2015. The following facts illustrate how the impugned provision on arrest warrants operates and provide the background for the analysis of its constitutionality.

(a) On 18 November 2013, while serving on Her Majesty's Canadian Ship (HMCS) *Ville de Québec*, Ordinary Seaman Levi-Gould requests to be voluntarily released from the Canadian Forces at the expiration of his terms of service in May 2014. This request is approved on 30 November 2013 for a planned release date of 18 May 2014.

(b) On 22 November 2013, Ordinary Seaman Levi-Gould is granted leave from 11 December 2013 to 6 January 2014 inclusively by the Executive Officer of HMCS *Ville de Québec*.

(c) On 16 December 2013, Ordinary Seaman Levi-Gould is posted to HMCS *Charlottetown*. He is to report on that ship upon returning from leave on 7 January 2014, after having performed "out routine" on HMCS *Ville de Québec*.

(d) On Tuesday, 7 January 2014, Ordinary Seaman Levi-Gould does not report on HMCS *Ville de Québec*. He does not report to HMCS *Charlottetown* either. In fact, he was, on that day, in Elsipogtog, New Brunswick, on the First Nation Reserve where he had spent his holiday leave period.

(e) Once it is determined that Ordinary Seaman Levi-Gould is absent at 0800 hours on 7 January 2014, a number of verifications are made by Chief Petty Officer 2nd Class Meredith, the acting coxswain and chief boatswain mate on HMCS *Ville de Québec* to try to locate him, including the Military Police Unit in Halifax, in application of the procedures described in the aide-memoire at Exhibit M1-6.

(f) The next day, Wednesday, 8 January 2014, the commanding officer of HMCS *Ville de Québec* signs and provides two documents to the Military Police Unit in Halifax: a form CF 97 "Description of Absentee or Deserter" and a "Warrant for Arrest" in the form promulgated at QR&O 105.06 under the authority of section 157 of the *NDA*. The "Warrant for Arrest" includes a mention to the effect that there were "reasonable grounds to believe that the alleged offender is or will be present" at a dwelling-house identified as 9120 Route 116 Elsipogtog, First Nation, New Brunswick.

(g) Also on 8 January, the acting coxswain of HMCS *Ville de Québec* speaks to Ordinary Seaman Levi-Gould, informs him that he is Absent Without Leave and asks him to report back to his unit or to a Royal Canadian Mounted Police (RCMP) Detachment. Ordinary Seaman Levi-Gould confirmed having participated in that discussion but his memory

of what was discussed is weak as he was intoxicated when the conversation took place.

(h) On 9 January 2014, the military police enters on the Canadian Police Information Centre (CPIC) database a mention to the effect that Ordinary Seaman Levi-Gould is wanted for absence without authority by virtue of a commanding officer's warrant. However, the same day, members of the military police in Halifax are informed by members of the RCMP detachment in Elsipogtog First Nation of concerns with executing the warrant for the arrest of Ordinary Seaman Levi-Gould in a dwelling-house on the reserve in the absence of a threat to the safety of persons. It would appear from the testimony of military police witnesses that the primary source of the concerns was the state of relations between the RCMP and the community of Elsipogtog First Nation at the time, as there had been demonstrations relating to shale gas in the fall of 2013 during which RCMP vehicles had been burned by members of the community. Another concern raised by the RCMP related to uncertainty about whether the warrant authorized by a commanding officer could be legally executed in a dwelling-house. What is ultimately understood from the military police point of view is that Ordinary Seaman Levi-Gould would not be sought inside a dwelling-house but would be arrested should he turn himself in or otherwise gets in contact with police.

(i) On 11 January 2014, the military police closes the investigation file on Ordinary Seaman Levi-Gould. Chief Petty Officer 2nd Class Meredith, from HMCS *Ville de Québec*, continues to follow up in relation to the investigation without significant developments. Eventually, he transfers the matter over to HMCS *Charlottetown*, Ordinary Seaman Levi-Gould's new unit.

(j) On 7 March 2014, a charge of desertion is laid against Ordinary Seaman Levi-Gould by the coxswain of HMCS *Charlottetown*. The Record of Disciplinary Proceedings reveals that a copy was not served on the accused.

(k) On 13 March 2014, Commander Druggett, commanding officer of HMCS *Charlottetown* sends a registered letter to Ordinary Seaman Levi-Gould at an address on Army Street, Elsipogtog, which was accepted by his sister, on 20 March 2014. The letter informed Ordinary Seaman Levi-Gould that his absence constitutes desertion, triable and punishable by court martial. Ordinary Seaman Levi-Gould was urged to return to his place of duty and, if required, he could be provided assistance for return travel. In his testimony, Ordinary Seaman Levi-Gould denied having seen this letter.

(l) On 4 July 2014, a decision is made not to proceed with the charge of desertion laid on 7 March 2014 and the Record of Disciplinary Proceedings is annotated accordingly by Commander Druggett, who testified that he had received legal advice as it pertains to that decision.

(m) The same day, a new charge of desertion is laid on a different Record of Disciplinary Proceedings, once again by the coxswain of HMCS *Charlottetown*. Although the statement of the offence is the same as on the charge laid on 7 March 2014, the particulars are different, notably as it pertains to the end of the period of desertion described as "remains absent without authority" as opposed to the mention on the previous charge to the effect that the accused remained absent "until apprehended."

(n) That charge of 4 July 2014 is referred by HMCS *Charlottetown* up the chain of command to the Director of Military Prosecutions. On 10 July 2014, Commander Druggett writes a second letter to Ordinary Seaman Levi-Gould to inform him that a charge of desertion has been laid against him *in absentia*, to provide disclosure of the evidence pertaining to that charge and to provide contact information for military defence counsel services at no cost. The letter explains to Ordinary Seaman Levi-Gould that a warrant has been issued for his arrest and that he is liable to imprisonment for desertion even after his release from the Canadian Forces, a sentence which could be reduced if he was to return on his own. Ordinary Seaman Levi-Gould has no recollection of ever having received that letter, apparently sent by ordinary mail.

(o) On 3 September 2014, the military prosecutor assigned to the file prefers the two charges at Exhibit 2 for desertion and for disobedience of a lawful command.

(p) On 8, 11 and 14 October 2014, three attempts are made by a process server to serve the charge sheet at Exhibit 2 on Ordinary Seaman Levi-Gould, without success.

(q) On 16 October 2014, Ordinary Seaman Levi-Gould is administratively released from the Canadian Forces under item 1(*c*) of the Table to QR&O Article 15.01, applying to a person "who has been illegally absent and will not be required for further service under existing service policy."

(r) On 15 December 2014, Ordinary Seaman Levi-Gould attends at the RCMP Detachment in Elsipogtog First Nation at the request of Constable Bradstreet, who needed to speak to him in relation to an ongoing investigation. The same day, the Military Police Unit in Halifax receives a call from Constable Bradstreet who wishes to inquire whether

the warrant for the arrest of Ordinary Seaman Levi-Gould is still valid. Sergeant Landry made inquiries with HMCS *Ville de Québec*, whose commanding officer had issued the arrest warrant and finally obtains confirmation that the warrant was still valid. Ordinary Seaman Levi-Gould testified that he had turned himself in to Constable Bradstreet and was fully expecting to be arrested in relation to his absence without authority. Instead, Constable Bradstreet spoke to him about turning himself in as he could not hold him and the military police would not immediately come to pick him up.

(s) Also on 15 December 2014, the Court Martial Administrator returns the package sent by the military prosecutor in preferring the two charges on 3 September, stating essentially that a court martial could not be convened due to lack of information from the accused person, specifically as to his choice for language of the proceedings.

(t) A number of e-mails are exchanged between 15 December 2014 and 12 January 2015 between the Military Police Unit, the prosecutor and the unit regarding an expected arrest of Ordinary Seaman Levi-Gould by the RCMP.

(u) On 8 February 2015, a new arrest warrant is issued under section 157 of the *NDA* by Commander Druggett, for the arrest of Ordinary Seaman Levi-Gould. Contrary to the first warrant, that second warrant did not include any authorization to effect the arrest in a dwelling-house. The warrant was handed over to the Military Police Unit in Halifax on 9 February and was placed on the CPIC database to the effect that Ordinary Seaman Levi-Gould is wanted for desertion.

(v) On 1 April 2015, Ordinary Seaman Levi-Gould is arrested by Constable Bradstreet from the RCMP in relation to an incident of assault and threats. He is kept in custody until an appearance at the Moncton courthouse scheduled for the next day. After arresting Ordinary Seaman Levi-Gould, Constable Bradstreet advises the Military Police Unit in Halifax of the arrest and of the presence of Ordinary Seaman Levi-Gould at the Moncton courthouse the next morning.

(w) On Thursday, 2 April 2015, two members of the military police from Halifax travel to the Moncton courthouse on orders from their superiors to attend a show cause hearing involving Ordinary Seaman Levi-Gould. Corporal Simms testified that he was present in uniform with his superior Master Corporal Drapeau when Ordinary Seaman Levi-Gould entered the courtroom. He appeared to be upset at seeing them. He said that once Ordinary Seaman Levi-Gould had been ordered to be released under conditions by the provincial court judge, he was taken by sheriffs out of the courtroom. For their part, the military policemen proceeded to

a corridor adjacent to the indoor parking garage where they had left their patrol car and were presented with Ordinary Seaman Levi-Gould by sheriffs so they could arrest him under the second commanding officer's warrant.

(x) Following his arrest by military police on 2 April 2015, Ordinary Seaman Levi-Gould is searched and given his rights to counsel which he expressed a desire to exercise. Consequently, he was taken to a nearby RCMP Detachment where he was allowed to speak with the duty military counsel from Defence Counsel Services. He was then taken from Moncton to the Military Police Unit in Halifax. Once there, he again speaks to counsel from Defence Counsel Services and is subsequently assessed as fit for cells by a military doctor. An account in writing is made by Corporal Simms to Master Corporal Drapeau, stating that Ordinary Seaman Levi-Gould should be retained in custody "to prevent the repetition of the offence." A report of custody is also sent by Corporal Simms to Commander Druggett, commanding officer of HMCS *Charlottetown*.

(y) On Friday, 3 April 2015, Ordinary Seaman Levi-Gould is served with the 3 September 2014 charge sheet, elects a trial in English and had his request for legal counsel faxed to the Director of Defence Counsel Services for the appointment of counsel to represent him free of charge. Lieutenant (N) Pellerin, the Custody Review Officer (CRO) appointed the same day, reviews the custody but refuses to release Ordinary Seaman Levi-Gould after considering his submissions. The reasons for this decision to retain in custody were reduced in writing and were threefold: first, the CRO was of the view that Ordinary Seaman Levi-Gould had been in a position to turn himself in since he had regained control over his life; second, the CRO was of the view that Ordinary Seaman Levi-Gould was a flight risk; and third, the CRO wanted to prevent the repetition of the offence.

(z) Following that decision, the acting commanding officer of the Military Police unit, Captain Humphries, e-mailed the Court Martial Administrator the information required to set in motion a Custody Review Hearing by a Military Judge. The Court Martial Administrator e-mailed the prosecutor and duty counsel from Defence Counsel Services at 1606 hours on 3 April to seek advisement as to when a Custody Review Hearing could be held. Many e-mails were exchanged over the weekend, especially involving the Director of Defence Counsel Services. Ultimately, it was determined on the evening of Saturday, 4 April 2015, that a Custody Review Hearing would not take place on Easter weekend.

(aa) The Custody Review Hearing was held on Wednesday, 8 April 2015. Ordinary Seaman Levi-Gould was released from custody on conditions by a Military Judge.

(bb) Following the release of Ordinary Seaman Levi-Gould, his counsel and prosecution counsel engaged in the usual back and forth regarding disclosure and discussions on trial dates.

(cc) On 8 October 2015, both counsel were involved in a scheduling teleconference with the Chief Military Judge to obtain a trial date. Ordinary Seaman Levi-Gould requested a trial on 30 November 2015 but, given the lack of judicial availability, the trial could not be set to begin until 10 February 2016.

THE LAW

Constitutional Provisions

[5] The applicant challenges the constitutionality of subsection 157(1) of the *NDA*, alleging in a Notice of Constitutional Question, at Exhibit M1-2, that it is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it is inconsistent with sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* and cannot be saved by section 1 of the *Charter*.

Articles 7 and 8 of the *Charter* read as follows:

> Life, liberty and security of person
>
> **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.
>
> Search or seizure
>
> **8.** Everyone has the right to be secure against unreasonable search or seizure.

Article 1 of the *Charter* reads as follows:

> Rights and freedoms in Canada
>
> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Article 52 of the *Constitution Act, 1982* reads as follows:

> Primacy of Constitution of Canada

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The impugned provision: subsection 157(1) of the *NDA*

[6] The provision challenged by the applicant is found in the Code of Service Discipline, Part III of the *NDA*, which constitutes the military justice system set up by Parliament to address the specific disciplinary needs of the Canadian Forces. The Code of Service Discipline applies to a variety of essential aspects, including in Division 3: Arrest and Pre-Trial Custody, covered in sections 153 to 159.9 of the *NDA*. Under these provisions, officers or non-commissioned members, including those appointed as military police, may arrest, with or without warrant, a person subject to the Code of Service Discipline. Subsection 157(1) of the *NDA* reads as follows:

> Issue of warrants
>
> 157. (1) Subject to subsection (2), every commanding officer, and every officer to whom the power of trying a charge summarily has been delegated under subsection 163(4), may by a warrant under his hand authorize any person to arrest any other person triable under the Code of Service Discipline who
>
> (a) has committed,
>
> (b) is believed on reasonable grounds to have committed, or
>
> (c) is charged under this Act with having committed
>
> a service offence.

[7] For the purpose of the analysis of this provision, it is useful to consider its broad scope, which needs to be understood from a number of angles. First, the category of persons who are granted the authority to issue arrest warrants includes any commanding officer and delegated officer. That is a broad category which is not restricted by the relationship any of these officers might have with persons who may be the subject of the arrest warrant. In fact, both warrants issued in this case were authorized by persons who stood in the position of commanding officers in relation to the person subject of the warrants. Second, the person who may be the subject of the arrest warrant need not be subject to the Code of Service Discipline at the time of the issuance of the warrant concerning him or her. Indeed, the warrant may target any person triable under the Code of Service Discipline who has committed a service offence. This may include, as it did in relation to the second arrest warrant issued in this case, a person who has been released from the Canadian Forces and is a civilian. Third, the QR&O pertaining to subsection 157(1) reveals that the scope of the provision is unlimited as to the place where a person subject to a warrant may be apprehended.

[8] Indeed, QR&O 105.06 provides for the format that every warrant issued for the purpose of affecting an arrest under section 157 should take. Should an arrest be foreseen in a dwelling-house, the mandated wording of the arrest warrant is

accompanied by a mention to the effect that this portion of the warrant should only be completed "if applicable and where the requirements of section 34.1 of the *Interpretation Act* have been satisfied." That requirement is to the effect that the person issuing the warrant must be satisfied by information on oath that there are reasonable grounds to believe that the person to be arrested is or will be present in the dwelling-house. The requirement was enacted as section 4 of *An Act to amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings*) (1997, chapter 39) on 18 December 1997, the day before the Supreme Court ruling in *R. v. Feeney* [1997] 2 S.C.R. 13, (*Feeney*) was to have full force and effect to require what the legislation brought forth; namely, a requirement for previous judicial authorizations in most cases where an arrest was to be performed in a dwelling-house. This requirement referred to but not spelled out in the QR&O and the *NDA* does not appear to be well known, as evidenced by the fact that there was no information on oath supporting the first warrant issued in this case, despite the fact that it authorized entry in a dwelling-house.

SUBMISSION OF THE PARTIES

Applicant

[9] In his written and oral submissions, the applicant challenges the constitutionality of subsection 157(1) on two distinct grounds. First, relying on the Supreme Court decision in *Feeney*, he argues that the provision engages section 8 of the *Charter* by potentially authorizing entry into a dwelling-house to search for and arrest persons subject to the warrant without the need for two constitutionally required prerequisites: first, a declaration on oath to the effect that reasonable and probable grounds exist to believe that an offence was committed and second, the approval of the warrant by a person capable of acting judicially. The applicant also attacks subsection 157(1) on the ground that it may deprive a person of his or her liberty in a manner contrary to a principle of fundamental justice under section 7 of the *Charter*; namely, that a warrant for arrest must be authorized by a person capable of acting judicially. Central to both of these grounds is the submission that commanding officers and delegated officers are incapable of acting judicially given that they are neither independent nor impartial.

[10] Even if the legislative provision at subsection 157(1) is challenged based on section 52 of the *Constitution Act, 1982*, the applicant also challenges the actions of the state actors involved in his arrest and prosecution by asking a remedy of a stay of proceedings under section 24(1) of the *Charter*. This confusion between the declaration of invalidity under section 52 and the personal remedy under subsection 24(1) should not detract me of my task of assessing the constitutionality of subsection 157(1) in a manner entirely independent of the assessment of government acts that violate *Charter* rights under valid laws. The alleged violations will be analysed subsequently.

Respondent

[11] In reply, the respondent warned the court about adopting an approach by which the impugned provision is seen under the prism of the *Criminal Code* and other instruments used in the administration of justice in the civilian sphere, as those ignore the specific disciplinary needs of the Canadian Forces. In oral arguments, the respondent overcame initial reticence regarding whether section 8 was engaged by subsection 157(1), admitting that it may authorize entry in dwelling-house. Yet, the respondent submits that the potential for violation of both sections 7 and 8 rights is limited by the training given to those who are authorized to issue arrest warrants and by their access to legal advice by military legal officers. It submitted that any impact on *Charter* rights of that section was marginal and incidental and is reasonable under section 1 of the *Charter*, although no evidence was produced specifically to that effect.

THE CONSTITUTIONAL QUESTION

Alleged violation of Section 8 of the *Charter*

[12] The applicant alleges a violation of section 8 *Charter* rights by virtue of the fact that subsection 157(1) allows entry in a dwelling-house without requiring a declaration on oath on the grounds to believe that an offence was committed and the approval of the warrant by a person capable of acting judicially. I do not see the need to analyse specifically the first alleged prerequisite of a declaration on oath. Even if such a declaration is required in the context of the administration of civilian justice as evidenced by the applicable *Criminal Code* provisions, the impugned arrest warrant provision operates differently in the military context. In the military justice system, the person seeking an arrest warrant will, in most cases, be entirely familiar with the officer who is granted the authority to issue the warrant. That is what has occurred here: it was clear from the answers provided by Commander Druggett during his cross-examination that he did not require to be provided with information on oath as he was entirely comfortable with the information relayed to him by his Executive Officer and Coxswain, his two partners in his "Command triad", to the effect that the offences alleged in the warrant were committed, in large part on the basis of the information they had received from Chief Petty Officer 2nd Class Meredith of HMCS *Ville de Québec*, a man Commander Druggett had known for 25 years.

[13] I believe the provision of information on oath would be significantly better than the apparent current practice based on trust by commanding or delegated officers of the person relaying information to them, without any document reflecting the substance and origin of what was said to the person authorizing the warrant. The weaknesses of that process were exemplified in this case when distortions appeared between what Commander Druggett remembered being told and the proven facts of this case. In any event, the issue of whether the information should be provided under oath is really a symptom of the other deficiency alleged by the applicant; namely, the identity, role and function of the officer given the authority to approve the arrest warrant. Under subsection 157(1), that officer can be, and in many cases will be, the commanding

officer of the accused. That is especially so when the investigation of service offences is done at the unit level. In those circumstances, the commanding officer is closely related to the investigator or investigators as a direct or indirect supervisor and, most importantly, as the person ultimately responsible for the administration of military discipline at the unit level, as evidenced by the testimony of Commander Druggett. The question is whether that reality makes subsection 157(1) unconstitutional.

[14] As far as section 8 is involved, the answer to that question lies in the two decisions of the Supreme Court referred to by the applicant. In *Feeney*, Justice Sopinka rendered a groundbreaking decision for a slim majority of the Court, finding that arrests in dwelling-houses engage section 8 *Charter* rights and must comply with the principles developed by a unanimous Supreme Court 13 years earlier in *Hunter v. Southam* [1984] 2 S.C.R. 145 (*Hunter*). That decision imposed a number of requirements in the context of arrest warrants. Those requirements were transposed to the context of arrest warrants by Justice Sopinka at paragraph 49 of his reasons in *Feeney* as follows:

> In my view, then, warrantless arrests in dwelling houses are in general prohibited. Prior to such an arrest, it is incumbent on the police officer to obtain judicial authorization for the arrest by obtaining a warrant to enter the dwelling house for the purpose of arrest. Such a warrant will only be authorized if there are reasonable grounds for the arrest, and reasonable grounds to believe that the person will be found at the address named, thus providing individuals' privacy interests in an arrest situation with the protection *Hunter* required with respect to searches and seizures. Requiring a warrant prior to arrest avoids the *ex post facto* analysis of the reasonableness of an intrusion that *Hunter* held should be avoided under the *Charter*; invasive arrests without a basis of reasonable and probable grounds are prevented, rather than remedied after the fact.

[15] As expressed in this quote, the *Charter* requires that a prior judicial authorization be normally obtained in relation to arrests in dwelling-houses. This takes the form of an arrest warrant authorized judicially before the arrest may be affected. The obvious question in the context of this application is whether the arrest warrants that a commanding officer or delegated officer can deliver under subsection 157(1) can constitute that required prior judicial authorization. In order to answer that question in due consideration to the military context, it is useful to review why such a prior authorization is constitutionally required in order to understand what qualities the person delivering it must possess. This analysis must start with *Hunter*, the case which outlined the principles to be followed in applying section 8 of the *Charter*, principles which were held applicable to arrest warrants in *Feeney*.

[16] Essentially, the analysis of Justice Dickson in *Hunter* finds its origin in the words themselves of section 8 of the *Charter*, which recognizes the right to be secure from "*unreasonable"* search and seizure. In his view, at page 157, "an assessment of the constitutionality of a […] statute authorizing a search or seizure […] must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective." Then, he turns to the issue of how this assessment is to be made, when, by whom and on what basis. On the issue of who can grant the authorization, Justice Dickson had that to say at pages 161-162:

> The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. At common law the power to issue a search warrant was reserved for a justice. In the recent English case of *Inland Revenue Commissioners v. Rossminster Ltd.*, [1980] 1 All E.R. 80, Viscount Dilhorne suggested at p. 87 that the power to authorize administrative searches and seizures be given to "a more senior judge". While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

[17] Justice Dickson went on to assess, in the context of *Hunter*, whether the authorization procedure met that requirement as to the capacity to act judicially. Ultimately, he concluded that the prior authorization mandated by section 10(3) of the *Combines Investigation Act* was inadequate to satisfy the requirement of section 8 of the *Charter*. It is helpful to reproduce his conclusion on that point at page 164:

> In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A member of the R.T.P.C. passing on the appropriateness of a proposed search under the *Combines Investigation Act* is caught by the maxim *nemo judex in sua causa*. He simply cannot be the impartial arbiter necessary to grant an effective authorization.

[18] The applicant submits that all commanding officers and delegated officers are neither independent nor impartial and, therefore, cannot act judicially. In support of this argument, he refers to *Ell v. Alberta* [2003] 1 S.C.R. 857 (*Ell*) and submits essentially that anyone who is granted power to issue arrest warrants must have the attributes of judicial independence. I disagree. The applicant's argument goes farther than *Hunter*, which, as seen in the extract of pages 161-162 quoted previously, rejected the notion that the person granting an effective authorization needed to be a judge. Instead, Justice Dickson adopted the criteria of the capacity to act judicially.

[19] I find the applicant cites *Ell* out of its context which was whether the tenure of Alberta's non-sitting justices of the peace was interfered with by legislation in violation of the principle of judicial independence. The starting point of the analysis of Justice Major in *Ell* was the specific authority granted to these persons to exercise a number of judicial duties. He concluded that the performance of these duties, in the context where

they were performed, required judicial independence. This finding was based on the cumulating powers held by Alberta justices of the peace, which lead to the conclusion, at paragraph 24, that the persons holding these offices are required to exercise significant judicial discretion in adjudicating on these matters. The duties of commanding officers and the context in which they perform these duties are entirely different than those of justices of the peace.

[20] Contrary to that of justices of the peace, the function of commanding officers is not solely to assist the judiciary and the courts, functions which require a level of independence associated with the judiciary to preserve the constitutional order and maintain confidence in the administration of justice as explained at paragraph 25 of *Ell*. In the constitutional order, commanding officers exercise authority over defence, not the administration of justice. Commanding officers are in the business of military efficiency. One of the tools to achieve this state of affairs is the military justice system created by Parliament in the *NDA* to "provide processes that would assure the maintenance of discipline, efficiency and morale of the military" as recently recognized by the Supreme Court of Canada in *R. v. Moriarity*, 2015 SCC 55 (*Moriarity*).

[21] That requirement to maintain efficiency and discipline necessitates the exercise of judicial roles by members of the military as recognized by the Supreme Court over 35 years ago in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 (*MacKay*), especially in these words by McIntyre J. joined by Dickson J. at page 402:

> Since very early times it has been recognized in England and in Western European countries which have passed their legal traditions and principles to North America that the special situation created by the presence in society of an armed military force, taken with the special need for the maintenance of efficiency and discipline in that force, has made it necessary to develop a separate body of law which has become known as military law. The development of this body of law included, sometimes in varying degree but always clearly recognized, a judicial role for the officers of the military force concerned.

[22] Subsequent to *MacKay*, the Supreme Court has analysed the judicial duty of military officers forming a General Court Martial under section 11(*d*) of the *Charter* in *R. v. Généreux* [1992] 1 S.C.R. 259. Contrary to the pretention of the applicant, the court's conclusion as to the required independence of judge advocates presiding over these courts martial is in no way conclusive with regard to other judicial roles or actors in the Code of Service Discipline. The applicant has not convinced me that commanding and delegated officers can never act judicially in issuing arrest warrants.

[23] As stated earlier, the appropriate test is not whether the person authorized to issue an arrest warrant possesses the independence of a judge but rather whether that person has the capacity to act judicially. Following the principles outlined in *Hunter*, applied to arrest warrants in dwelling-houses in *Feeney*, this capacity to act judicially is the capacity to act as a truly neutral and detached arbiter in locating the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state in law enforcement before authorizing an arrest warrant in a dwelling-house.

[24] As explained previously, subsection 157(1) does not provide for any limit as to when a commanding or delegated officer may exercise his or her power to authorize a warrant into a dwelling-house. It could, as it did in relation to the first warrant issued in this case, allow a commanding officer to authorize a warrant for the arrest of a member of his unit in a dwelling-house, in relation to an offence that has been and continues to be investigated by or under the close supervision of his coxswain and/or executive officer, two members of his "command triad" whose duties are to allow the commanding officer to discharge his or her responsibilities for the good discipline, morale and efficiency of the personnel under his or her command.

[25] In my view, a commanding officer in this position, regardless of training, ethics or good intentions, is so involved in the investigatory functions performed by his closest advisors in his team that he or she cannot act in a judicial capacity when authorizing an arrest warrant under subsection 157(1).

[26] To be clear, I have no reason to doubt the good faith and commitment of any commanding officer, including Commander Druggett, in acting fairly. However, to paraphrase Dickson J. in *Hunter*, the issue is not the honesty or good faith of those authorized to act, such as a commanding officer or members of his or her team. It is whether the nature of a commanding officer's duties, at least in relation to the members of his or her unit, accords with the neutrality and detachment necessary to assess whether the point has been reached where the interests of the individual to be arrested in a dwelling-house must constitutionally give way to those of the state in enforcing the law and, in this case, enforce discipline. I find that, in these situations, a commanding officer cannot be considered as a "neutral and detached arbiter."

[27] Therefore, I conclude that subsection 157(1) is incompatible with the requirements of section 8 of the *Charter*.

Alleged violation of Section 7 of the *Charter*

[28] Even if this conclusion is sufficient to dispose of the constitutional question and move on to the analysis of the justification and eventual remedies, I need to recognize that the applicant also alleged a violation of section 7 of the *Charter* as a basis for the unconstitutionality of subsection 157(1). However, it became clear during arguments that the alleged violation of section 7 was raised with a view of obtaining a declaration of non-constitutionality that would taint the second warrant under which authority the applicant was ultimately arrested on 2 April 2015, warrant which did not target a dwelling-house and, therefore, did not engage section 8 of the *Charter per se*. This confuses the declaration of invalidity under section 52 of the *Constitution Act* and the personal remedy, arguably under section 24(1) of the *Charter*. As provided by the Supreme Court in *Canada v. Schachter* [1992] 2 S.C.R. 679 (*Schachter*) at page 720, courts usually don't provide an individualized remedy under section 24(1) in conjunction with a declaration of non-constitutionality under section 52(1). Indeed, doing so would be tantamount to giving the declaration of invalidity retroactive effect.

[29] Even if I am not required to rule on the issue, I believe the preoccupations that I expressed as to the requirement for a neutral and detached arbiter would apply equally to a challenge to subsection 157(1) under section 7 of the *Charter*. That is so even if the balancing to be done would be different absent privacy rights of the kind found in relation to a dwelling-house.

[30] Indeed, section 7 guarantees 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. Any challenge under section 7 requires a claimant to prove two things: first, that there has been or could be a deprivation of the right to life, liberty and security of the person; and, second, that the deprivation was not or would not be in accordance with the principles of fundamental justice. The respondent concedes that section 7 is engaged in this case and I agree. Subsection 157(1), by allowing arrest, engages the liberty interests of a person or persons named in the arrest warrant.

[31] The first portion of the test having been met, the question remains as to what is the applicable principle of fundamental justice that would have been infringed by subsection 157(1) of the *NDA*. The applicant was unable to point to any clear authority stating the principle of fundamental justice which he alleges; namely, that arrest warrants can only be authorized by persons capable of acting judicially. However, I do believe this principle to meet the requirements laid out by the Supreme Court of Canada for recognizing a new principle of fundamental justice in the case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at paragraph 8. It is a legal principle, capable of being identified with precision and applied in a manner that yields predictable results. As for the requirement that there be sufficient consensus that the principle is "vital or fundamental to our societal notion of justice," I take from cases such as *Hunter* and *Feeney* as well as from legislative facts requiring arrest warrants to be authorized by persons who benefit from a high degree of independence that this requirement is met.

[32] On the facts highlighted in the evidence in this case, I do believe that the fact an arrest warrant authorized by a commanding or delegated officer is placed as a matter of practice on CPIC and is available and seen in police stations and vehicles across the country constitutes a real concern for the liberty interests of the person named in the warrant and thereby considered as wanted. The fact that such a warrant may have been authorized by a person directly involved in the investigation of the offence would, in my view, violate section 7 of the *Charter*.

Justification under section 1 of the *Charter*

Introduction

[33] Now that subsection 157(1) has been found to violate specific rights guaranteed by the *Charter*, the respondent has the burden of demonstrating that the impugned provision constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. In this case, the respondent has produced no evidence pertaining

specifically to this issue. However, justification does not always have to be supported by evidence, it may be demonstrated by the application of common sense and inferential reasoning. The factors set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, known as "the *Oakes* test" remain relevant and the governing test to be applied to determine whether an impugned provision can be "saved" by section 1. It has been framed in more than one way, but in my view there are four steps to the section 1 analysis, as follows:

(a) the objective of the provision must be important enough to warrant overriding *Charter* rights;
(b) there must be a rational connection between the limit on the *Charter* right and the legislative objective;
(c) the limit should impair the *Charter* rights as little as possible; and
(d) there must be an overall proportionality between the benefits of the limit and its deleterious effects.

The importance of the objective

[34] It has been recently ruled by the Supreme Court in *Moriarity* that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military. Subsection 157(1) is one of these processes. It allows for the grant of authority to commanding and delegated officers to issue formal warrants for the arrest of service offenders, providing those executing the warrant with formal recognition of their task, from the hand of those most concerned with discipline, efficiency and morale in the military.

[35] In analysing whether a given objective is pressing and substantial, courts must accord a measure of leeway to government. I find that in light of the existence of warrants for arrest of persons in other legislation, especially the *Criminal Code*, the objective of designing a process by which arrest warrants can be issued in the military justice system is a sufficiently pressing to meet this step of the test.

The rational connection

[36] The question of whether there is a rational, i.e., non-arbitrary and non-capricious, connection between the legislative objective and the law being challenged can also be answered positively. This test is not particularly onerous. I find that the authority to issue arrest warrants is sufficiently connected to the objective of providing processes that would assure the maintenance of discipline, efficiency and morale of the military.

The minimal impairment

[37] The minimal impairment test is a core element of the proportionality review and it is where subsection 157(1) fails in this case. Indeed, I found that those whose arrest is requested by a person engaged in an investigation must have their privacy and liberty interests evaluated by someone who possesses the neutrality and detachment necessary

to balance those interests against the interests of the state in enforcing military discipline. Subsection 157(1) entirely ignores that requirement of a neutral arbiter by giving a class of person the power to issue arrest warrants regardless of where they stand in relation to the person to be arrested or the investigation being conducted, with the exception of the rank requirement at subsection 157(2), an issue unrelated to *Charter* concerns. I am of the view that there were other reasonable ways for Parliament to satisfy its objective with less impact on the concerns of neutrality and detachment of the person issuing the arrest warrant. Indeed, without expressing any views as to their sufficiency, concerns over neutrality appear to have been addressed in relation to search warrants at section 273.4 of the *NDA*.

[38] There is, in my view, ways which can and should have been explored to provide for the issuance of arrest warrants by persons detached from the investigative functions. Consequently, I find that subsection 157(1) does not impair *Charter* rights as little as possible.

The overall proportionality

[39] I also find that there is no proportionality between the effects of the provision responsible for limiting the *Charter* rights and freedoms and the objective which has been identified to be of sufficient importance. No evidence was produced as to the effectiveness of subsection 157(1) in achieving the objective of enforcing military discipline. Indeed, the arrest with warrant of persons suspected of having committed service offences are far from being the main point of entry into the military justice system, and from the cases brought to military judges every year, appear to be quite marginal.

[40] Even assuming the effectiveness of subsection 157(1), at least in relation to absentees without leave, the deleterious effects brought by this provision are far from marginal and incidental, contrary to the submission of the respondent. Indeed, as stated at subsection 157(4), arrest warrants do not derogate from the authority to arrest without warrant. Sections 154 to 156 of the *NDA* provide generous powers to arrest without warrant persons subject to the Code of Service Discipline. It is difficult not to conclude on the facts of this case, especially the testimony of Commander Druggett and the content of the aide-memoire he produced, that the goals to be obtained from commanding officers issuing warrants for arrest under subsection 157(1) are first, to be able to arrest in dwelling-houses occupied by military members and their family; and second to ensure the person absent is listed as wanted on CPIC, information made available in every police station and police vehicle in the country. In addition, the fact that the first warrant issued in this case authorized entry in a dwelling-house without meeting the requirement of section 34.1 of the *Interpretation Act* makes the argument of the respondent unconvincing to the effect that training given to those who are authorized to issue arrest warrants and their access to legal advice by military legal officers would alleviate the risk of any potential *Charter* violation.

[41] I believe arrest warrants issued by persons who are not neutral arbiters have more than a marginal impact. They constitute a frontal assault on the rights of members of the Canadian Forces, past or present, who may be triable under the Code of Service Discipline. The deleterious effect of subsection 157(1) limit *Charter* rights in a manner that is excessive in relation to the very limited benefits this provision has.

Conclusion on the s.1 analysis

[42] I conclude that subsection 157(1) violates the rights guaranteed by the *Charter* and cannot be demonstrably justified in a free and democratic society under section 1 of the *Charter*. I disagree with the argument of the respondent to the effect that reaching such a conclusion unjustifiably imports a requirement from the civilian justice to the military justice system in disregard to unique military requirements. Indeed, I believe in the legitimacy of the military justice system as much as former Court Martial Appeal Court Chief Justice Strayer did when he wrote the reasons in *R. v. Reddick*, [1996] CMAC 393 in which he invited a move away from assuming an antithesis between military justice, on the one hand, and the *Charter* on the other. He said the more modern judicial and legislative approach has been to bring these elements into closer harmony by placing the emphasis in making the military justice system meet *Charter* standards within the special military context. According to the respondent, subsection 157(1) has been untouched since the 1950 *NDA*. It has not kept up with the recognition of individual rights which have occurred since. The approach recognizing the legitimacy of the military justice system was never meant to legitimize violations of the rights of members of the Canadian Forces. As former Supreme Court Chief Justice Lamer said in his report of 2003, members of the military should have the same rights as other citizens unless a departure is demonstratively necessary for achieving successful missions. The demonstration has not been made as to any such operational requirement that would preclude access to a neutral arbiter prior to obtaining permission to enter someone's house or to list someone as wanted.

The applicable constitutional remedy

[43] Section 52 of the *Constitution Act* does not confer courts with discretion to leave a legislative provision on the books subject to discretionary case-by-case remedies when it has found that the provision violates the *Charter*. Yet, section 52 grants the court jurisdiction to declare laws of no force or effect only "to the extent of the inconsistency." Here, the extent of the inconsistency is the grant of authority to issue arrest warrants in subsection 157(1) to a class of persons that may include persons whose involvement with the investigation prevent them from being considered neutral arbiters capable of balancing the rights of those to be arrested with the interests of discipline and enforcement of the law. Recognizing that the applicant is seeking an order declaring that subsection 157(1) is of no force or effect, I must nevertheless consider if other, less drastic options would be open, on the basis of the extent of the inconsistency which I have just recognized and the principles outlined by the Supreme Court of Canada in *Schachter*.

[44] Although none of the parties saw fit to make any submissions on this issue, I find that this is not one of the clearest of cases where "reading in" would be warranted. Indeed, Parliament has decided unequivocally to confer the authority to issue arrest warrants to a category of persons which I found is too broad to meet constitutional requirements. There are potentially several options available to correct this deficiency. One of those may be to draw a line somehow in the category of persons foreseen by Parliament, for instance by excluding officers from the accused's unit in the class of people who can authorize an arrest warrant. Another option may be to modify the category of persons to whom this task may be conferred, for instance by transferring this responsibility to superior commanders or even military judges. In my view, this court is not in the best position to determine where this line should be drawn to arrive at a constitutional result. It is, therefore, not appropriate for me to read in subsection 157(1) language that would remedy the constitutional infringement which I have identified. This is a prerogative of Parliament.

[45] Consequently, I conclude that I must declare subsection 157(1) to be of no force or effect. The issue which then arises is whether the declaration of invalidity should be temporarily suspended to give Parliament an opportunity to bring the impugned provision into line with its constitutional obligations. Although once again the court has obtained no submissions from parties on this issue, looking at the criteria enunciated by the Supreme Court of Canada at paragraph 88 of *Schachter*, I find that none of those would apply here to warrant temporarily suspending the declaration of invalidity. Indeed, the arrest of a person through a commanding officer's warrant is not the privileged means of access into the military justice system. The absence of this provision will not threaten the rule of law, would not endanger the public and would not deprive anyone of benefits.

ALLEGED VIOLATIONS OF THE APPLICANT'S *CHARTER* RIGHTS

Introduction

[46] As mentioned, in addition to challenging the constitutionality of subsection 157(1), the applicant alleges that his *Charter* rights have been infringed by state actors. Specifically, he alleges that his rights under sections 8 and 7 of the *Charter* were violated in this case by the issuance of both of the arrest warrants against him. He also submits that his right to be tried within a reasonable time under section 11(*b*) of the *Charter* was violated by the failure of the various military authorities involved to bring him to justice sooner. Finally, the applicant submits that his rights under section 9 of the *Charter* were violated by his arrest and subsequent detention under the second of those warrants. I will address these submissions in turn.

Alleged violations of sections 8 and 7 of the *Charter*

[47] In his written and oral submissions, counsel for the applicant makes a direct link between the finding he asked the court to make on the constitutionality of subsection 157(1) of the *NDA* under sections 8 and 7 of the *Charter*, and the issue of whether the

rights of the accused under these provisions were violated by state actors. Essentially, he argues that commanding officers, members of the military police and others knew or should have known that the authority on which they based themselves to issue and enforce the two arrest warrants in this case was constitutionally invalid. As counsel for the applicant admitted, there has been no authority in jurisprudence, military or legal doctrine or otherwise that suggested subsection 157(1) might be unconstitutional before he raised the argument in this case. All that is in evidence is the reluctance expressed by RCMP constables in executing a commanding officer's arrest warrant in a private dwelling without a *Feeney* warrant, a factor secondary to the security concerns expressed by the RCMP as it pertains to poor relations with the Elsipogtog First Nation.

[48] What the argument of the applicant fails to consider is that laws are presumed to be constitutional. A declaration of this court under section 52 of the *Constitution Act, 1982* to the effect that a legislative provision on which government officials relied on is unconstitutional and of no force or effect is a remedy which constitutes a substantial change in the law. That remedy may be purely prospective in the appropriate circumstances. Indeed, as a majority of Supreme Court justices found in *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, (*Hislop*) in the context of financial consequences to the government of the remedy obtained:

> 103. People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.

[49] In my view, a clearly compelling factor at play in this case is reasonable or in good faith reliance by government officials on the legislative provision at subsection 157(1). There is no reason in this case to provide an individualized remedy in conjunction with the declaration of non-constitutionality under section 52. The allegations of the applicant are akin to asking the court to find fault or negligence on the part of state actors involved in this case on the basis of a finding made months afterwards. Yet, I am of the view on the evidence that officials in this case acted in good faith and without abusing their power under prevailing laws. Laws must be given their full force and effect as long as they are not declared invalid.

[50] Once the finding of unconstitutionality is evacuated from the equation, there is very little left of the argument of the applicant as to any actual violations of section 8 or 7 rights. Even if I were to accept the evidence about the preference of the RCMP for a judicial *Feeney* warrant to be used instead of a commanding officer’s warrant to search

for the applicant in a dwelling-house, meaning that the military police were on notice of the unlawfulness of commanding officers' warrants for that purpose, this would be inconsequential. Indeed, even if the first warrant of 8 January 2014 targeting a dwelling-house was not appropriately authorized as it did not meet the requirement of section 34.1 of the *Interpretation Act*, that warrant was never executed. As for the second warrant, it was both issued by Commander Druggett and executed by the military police at a time that it was valid. There can be no violation of Section 7 on that basis alone and no other violation by state actor was specifically alleged. The case of *R. v. Henry*, [1999] B.C.J. No. 917, brought to my attention by the applicant is not applicable on the facts of this case.

[51] Given discussions during oral arguments, I wish to elaborate on the possibility that was open to any peace officer interacting with Ordinary Seaman Levi-Gould after he had been released from the Canadian Forces on 16 October 2014 and had become a civilian, to bring him before a civilian justice for a decision as to whether he should be delivered into service custody, in application of the scheme found at sections 252 and 253 of the *NDA*. The interrogation I expressed was whether the civilian status of Ordinary Seaman Levi-Gould should have been recognized by giving him access to a civilian justice for a judicial determination, as opposed to dealing with him through purely military instruments such as a commanding officer's arrest warrant and the consequential custody regime applicable to persons arrested under the *NDA*. I also inquired as to what time limits were appropriate to deal through purely military means with a former member who had become a civilian while absent without authority.

[52] No argument was brought to my attention pointing to a *Charter* violation concerning the way the accused was treated in relation to his status as a civilian. I have considered the Court Martial Appeal Court decision of *R. v. Wehmeier*, 2014 CMAC 5 which dealt with section 7 implications of the prosecution of a civilian before a court martial. However, the scope of that decision is limited to the objectives sought to be achieved by Parliament in enacting the specific provisions making civilians accompanying the Canadian Forces subject to the Code of Service Discipline. As the court stated, "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*." In this case, the alleged offences were committed by a military member and are not triable by a civilian court. Those important distinctions lead me to conclude there is nothing to import from the *Wehmeier* decision to this case.

[53] Ultimately, appearance before a civilian justice is not an essential prerequisite to turning over a deserter or absentee without leave to military authorities. Under section 254 of the *NDA*, a person who surrenders to a constable and admits desertion or absence without leave may be delivered into service custody without being brought before a justice. The testimony of Ordinary Seaman Levi-Gould is to the effect that he attended the RCMP Detachment in December 2014 and discussed his situation of absentee with Constable Bradstreet at the time, describing this encounter as "turning himself in." If that is the case, he could have been delivered to service authorities without being brought before a justice. The fact that this state of affairs ultimately occurred over three

months later, on 2 April 2015, outside of the scheme of sections 252 to 254 of the *NDA*, is insufficient to allow me to conclude on my own motion that the rights of the accused under section 7 or even section 9 of the *Charter* were infringed on that basis.

Alleged violations of section 11(*b*) of the *Charter*

[54] The applicant is attempting to show a pattern of carelessness constituting a violation of his right to be tried in a reasonable time under section 11(*b*) of the *Charter* by referring to alleged failures of various authorities to know of the unconstitutionality of subsection 157(1) as well as a somewhat contradictory argument to the effect that authorities should have engaged sufficient efforts to execute these warrants sooner. The applicant initially alleged that what was discussed as the "11(*b*) clock" started ticking as early as the issuance of the first arrest warrant on 8 January 2014, the day after he had gone absent, and continued until the moment the proceedings of this court commenced on 10 February 2016, a duration of approximately 25 months. The applicant's counsel conceded during oral arguments that the starting point could well be 7 March 2014, the date on which the first charge was laid on a Record of Disciplinary Proceedings.

[55] The nature of the charge of desertion, central to the conduct alleged against the accused in this case, makes precedents involving section 11(*b*) challenges difficult to apply. I believe it is important to keep in mind the interests protected by section 11(*b*) of the *Charter*. Those are: security of the person, liberty and the right to a fair trial, as well as society's interest in having the matter tried on its merit. On the basis of those broad principles, the applicant's argument in my view suffers from two significant weaknesses. First, up to his arrest by the military police on 2 April 2015, the applicant was unaware of the fact that he was charged. He remained free as far as these charges were concerned. In these circumstances, it is difficult to see how the security of his person, his liberty and his right to a fair trial were infringed or threatened. The prejudice he described suffering, namely the anguish of eventually having to deal with military authorities to answer for his absence and the stigma of being known in his community as a deserter, with consequences on his perceived reliability for prospective employers, was therefore not strictly related to the charge laid against him under the military justice system. The second weakness in the applicant's argument is the fact that, contrary to a person charged with an offence who is at the mercy of a justice system for months before he or she can get their day in court, the accused in this case had the possibility to end the prejudice he alleges he suffered by turning himself in or by reporting back to his ship or, in fact, any unit of the Canadian Forces.

[56] I do acknowledge that Ordinary Seaman Levi-Gould testified that he did turn himself in during a meeting with Constable Bradstreet at the RCMP Detachment in Elsipogtog First Nation on 15 December 2014. I find that moment is the most favorable to the applicant that I can adopt as a starting point to the 11(*b*) clock. The ensuing delay to these proceedings would be 14 months in total. No evidence was introduced to reveal that this would be an exceptional period for proceedings before courts martial.

[57] I note that in the period of time which preceded the arrest of the accused, the prosecution and other military authorities never abandoned this matter. In fact, specific actions were taken to reduce what could be qualified as "inherent intake time requirements." Charges were laid and, most importantly, preferred *in absentia* to a point where the matter could not go further given the technical impossibility of the Court Martial Administrator to convene a court martial. The result of this course of action was that once the accused was detained and could be served with the charges and elect language of proceedings, the prosecution was in a position to proceed with a trial on the matter within days. The charges in this case do not involve any complexity and from the facts presented in this application, I evaluate that the prosecution's case would not have consumed more than one court day. The disclosure relating to the charges would not have been overly complex either and appears to have been made available in a letter to the accused in July 2014 and to defence counsel in time for the Custody Review Hearing.

[58] It appears that most of the delay from December 2014 onwards was caused by the applicant's desire to challenge the way he was brought under military jurisdiction and the provision under which arrest warrants were issued by commanding officers. This generated additional disclosure requirements from the prosecution, a process that did not always go smoothly. As explained in *R. v. Morin*, [1992] 1 S.C.R. 771 at paragraph 44, the choice an accused makes to engage in preliminary procedures and strategy must be taken into account in determining what length of delay is reasonable. This is not to place any blame; this application was entirely legitimate and, in a significant way, successful.

[59] I also note that the other portion of the post-arrest delay, between the date requested by the accused for trial on 30 November 2015 and the date this court martial was convened on 10 February 2016, was due to limits on judicial resources. Contrary to the submission of the applicant, I do not find that anyone involved in the carriage of this file acted negligently or in bad faith.

[60] Applying the guidance of the Supreme Court of Canada on 11(*b*) challenges to the facts of this case, from the starting point of 15 December 2014, in light of the fact that most of the delay was caused by actions of the accused, the inherent time requirements to deal with the issues raised in this case and the limits on institutional resources combined with the absence of any significant prejudice resulting from the charges, I am of the opinion that the delay in this case was not unreasonable.

Alleged violations of section 9 of the *Charter*

[61] The next argument of the applicant concerns the application of section 9 of the *Charter* and is once again, in part, tied to the validity of the warrant under which Ordinary Seaman Levi-Gould was arrested on 2 April 2015. The applicant's submission is to the effect that the arrest warrant was constitutionally invalid, making his detention non-authorized by law and therefore arbitrary, in violation of his section 9 rights. For

the reasons mentioned earlier on the prospective effect of a declaration of invalidity, this argument must be dismissed.

[62] The applicant also submitted in written arguments that in the absence of a valid arrest warrant, the military police did not have the authority to arrest him without a warrant as he was no longer subject to the Code of Service Discipline. As the warrant was valid at the time of the arrest, this argument must also fail. The jurisdiction of the military police to effect an arrest of a civilian outside of a defence establishment has been recognized recently in *P.H. v. Canada (Attorney General)*, 2015 BCSC 2266 at paragraph 78. I have dealt earlier with the issue of civilian status of the accused at the time of arrest in relation to section 252 of the *NDA*. To the extent that the decision made by the military police to deal with the applicant through purely military instruments instead of bringing him to a civilian justice involves rights under section 9 of the *Charter*, no sufficient argument was brought to allow me to conclude that the rights of the accused under section 9 of the *Charter* were infringed on that basis.

[63] The applicant also raises other arguments concerning his continued detention from the moment he was brought from Moncton, New Brunswick to the Military Police Unit in Halifax. The applicant alleges that the decision made by Corporal Simms to commit him to Master Corporal Drapeau's custody upon arriving at the Military Police Unit on 2 April 2015 was arbitrary, as the grounds mentioned in writing on the Report of Custody (Produced as exhibit KK of Phyllis Nadeau's affidavit) were "to prevent the repetition of the offence." Indeed at that point in time, the accused had been administratively released from the Canadian Forces and could not, therefore, repeat the offence of desertion. This motive of prevention of the repetition of the offence was also mentioned by Lieutenant (N) Pellerin, the Custody Review Officer, as one of three reasons why he decided to retain Ordinary Seaman Levi-Gould in custody in his written decision of 3 April 2015, produced as exhibit OO of Phyllis Nadeau's affidavit.

[64] It is clear to me that the mention of “repetition of the offence” as a reason to commit and then retain Ordinary Seaman Levi-Gould in custody was erroneous. The question is what impact these errors by Corporal Simms and Lieutenant (N) Pellerin should have on the issue of whether the custody was arbitrary under section 9 of the *Charter*. I believe these errors do not demonstrate a violation of section 9 rights on the facts of this case. I note that the committal and retention in custody was made in respect of the legal framework promulgated in the *NDA* and ultimately led to the involvement of the Court Martial Administrator who was prepared, within hours of the decision of Lieutenant (N) Pellerin, to take steps to have a custody review hearing before a military judge. The law authorized Lieutenant (N) Pellerin and Corporal Simms to apply discretion and make the decision they made. In the absence of any argument to the effect that the law is arbitrary, I cannot conclude that such errors in the exercise of their discretion granted by law are sufficient, in themselves, to make the detention arbitrary.

[65] In addition, the facts reveal there were reasons to retain Ordinary Seaman Levi-Gould in custody. The unchallenged testimony of Corporal Simms before me is to the effect that he was of the opinion that Ordinary Seaman Levi-Gould was a flight risk on

2 April 2015, even if he failed to mention this fact on the Report of Custody. For his part, Lieutenant (N) Pellerin stated in his written decision of 3 April 2015 that he believed Ordinary Seaman Levi-Gould was a flight risk. In light of the conduct of the accused in the nearly 15 months between his absence and his arrest, it was not unreasonable nor arbitrary for both Corporal Simms and Lieutenant (N) Pellerin to keep Ordinary Seaman Levi-Gould in custody in consideration of the fact that he was a flight risk. There were reasons to believe that if Ordinary Seaman Levi-Gould were to be released, he would refuse to accept responsibility for his actions and continue to flee military jurisdiction. Consequently, I cannot find a violation of section 9 in the committal and retention in custody on the facts of this case.

[66] If I am wrong on that conclusion, I wish to state that if I had found a breach of section 9, I would not have ordered a stay of proceedings as a remedy. Indeed, a stay of proceedings is only granted under section 24(1) of the *Charter* in the clearest of cases. Here, the detention occurred post-offence and was unrelated to the gathering of evidence. It did not prejudice the accused's ability to make full answer and defence. This is not a case where the applicant was held as a result of an inappropriate police practice or procedure that the court needs to dissociate itself from. When given the opportunity during oral arguments, the applicant's counsel could not refer me to any authority where a stay of proceedings had been ordered as a result of a violation of section 9 in the military context. I studied the precedent of *R. v. Fondren*, 2011 CM 4005 where the military judge had found a breach of section 9 but had assessed the appropriate remedy to be a reduction of sentence and not the stay of proceedings requested by the applicant.

[67] To be clear, I would not want my conclusion on the absence of a *Charter* breach in relation to the accused’s detention to be taken as meaning that I will ignore the fact that the accused was held in custody if and when I have to impose a sentence in this case. I have discretion to consider the actions of all state officials which resulted in the detention of the accused in deciding on a proper sentence, *Charter* breach or not. At the end of the day, there could be little practical difference in the treatment of the accused on the facts of this case between finding a breach remedied by a reduction in sentence and considering the fact that the accused spent time in pre-trial custody, especially over the Easter weekend as was the case here, in evaluating what would be a proper sentence.

Conclusion

[68] The Court has found that the rights of the applicant under sections 8, 7, 9 and 11(*b*) of the *Charter* have not been violated on the facts of this case.

FOR THESE REASONS, THE COURT:

[69] **GRANTS** the application in part;

[70] **DECLARES** subsection 157(1) of the *National Defence Act* to be of no force or effect under section 52(1) of the *Constitution Act, 1982*.

[71] **DISMISSES** the remainder of the application.

Counsel:

The Director of Military Prosecutions, as represented by Major P. Rawal

Lieutenant-Commander B. Walden and Captain F. Ferguson, Defence Counsel Services for Ordinary Seaman T.A. Levi-Gould