COURT MARTIAL

Citation: *R. v. Thiele*, 2016 CM 4015

Date: 20161024
Docket: 201526

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Leading Seaman C. R. Thiele, Applicant

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

DECISION RESPECTING AN APPLICATION ALLEGING A VIOLATION OF THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME PURSUANT TO SECTION 11(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

INTRODUCTION

[1] At the opening of this Standing Court Martial on 13 October 2016 I heard a preliminary application made by Leading Seaman Thiele under section 187 of the *National Defence Act* (*NDA*) alleging that his right to be tried within a reasonable time under section 11(*b*) of the *Canadian Charter of Rights and Freedoms* was infringed in the conduct of his prosecution. Prior teleconferences with counsel revealed that this application raises a novel issue of law for the military justice system as this is the first time an application under section 11(*b*) of the *Charter* is submitted for a ruling before a court martial since the Supreme Court of Canada rendered an important decision on that issue on 8 July 2016 in *R. v. Jordan*, 2016 SCC 27 (hereinafter referred to as *Jordan*). Indeed, there is a fundamental disagreement between parties as to the impact of the *Jordan* decision on the military justice system.

[2] I benefitted from written and oral arguments from counsel on three questions which will be analysed in these reasons. The first two issues were argued orally in one distinct phase, hearing both sides alternatively on the questions of whether *Jordan* should be applied to the military justice system and, if so, what length should be adopted for a presumptive ceiling in applying the new section 11(*b*) analytic framework prescribed in that decision. In a second phase of oral arguments, I heard each party in turn on the final question as to whether a stay of proceedings should be ordered in this case as a remedy for the alleged breach of the right to be tried within a reasonable time.

FACTS

[3] The facts were introduced by the parties on consent and consist of two affidavits from their respective administrative assistants, to which documents found on their respective files were annexed, consisting principally of emails exchanged between counsel assigned to the file. In addition, the applicant produced as part of Exhibit M1-6 two transcripts of scheduling teleconferences involving counsel for both parties and the Chief Military Judge (CMJ) on 7 December 2015 and 21 April 2016 respectively. The applicant also produced as Exhibit M1-4 a case file timeline. For its part, the respondent, in addition to emails, produced as part of Exhibits M1-3 and M1-7 statistical documentation on courts martial held in the last 10 years.

ANALYSIS

First Question: Should *Jordan* be applied to the military justice system?

[4] Both parties agree that the right of an accused to be tried within a reasonable time, enshrined in section 11(*b*) of the *Charter*, applies to the Canadian Armed Forces and the military justice system. Accused persons before courts martial have benefitted from stays of proceedings when military judges have found infringements of their individual rights under section 11(*b*). In the determination of these questions, military judges have applied Supreme Court of Canada jurisprudence, most notably the decision of *R. v. Morin*, [1992] 1 S.C.R. 771 (hereinafter referred to as *Morin*) and more recently, the Court Martial Appeal Court (CMAC) decision in *R. v. LeGresley*, 2008 CMAC 2, largely based on *Morin*, with some analysis specific to the military justice system (hereinafter referred to as *LeGresley*).

[5] In the *Jordan* decision on 8 July 2016, a close majority of five justices of the Supreme Court of Canada overruled *Morin*, finding that a new framework was required for applying section 11(*b*). At the heart of that new framework is a presumptive ceiling beyond which delay—from the charge to the actual or anticipated end of trial—is presumed to be unreasonable, unless exceptional circumstances justify it. Leading Seaman Thiele, the applicant, wishes to benefit from that new framework. The respondent, represented by the Director of Military Prosecutions (DMP), argues the *Jordan* decision should not be applied to the military justice system considering that *Jordan* was rendered in the context of problematics and needs unique to the criminal justice system and does not deal with or even mention military law in any way.

[6] While I acknowledge that the military justice system was not the object of the *Jordan* decision, it remains that the main focus of *Jordan* is the individual right of accused persons to a trial within a reasonable time under section 11(*b*) of the *Charter*. I see no reasons why persons subject to the Code of Service Discipline could not benefit from developments in the law regarding that issue. Indeed, persons facing charges before a service tribunal are not second class citizens; while the procedure applicable to their trial may be specific to the court before which they appear, their rights guaranteed by the *Charter* are the same as any other accused before any other court in Canada.

[7] The respondent argues that the *Jordan* decision is not relevant to the military justice system as there has not been any significant delay in cases before courts martial in the last ten years. In other words, *Jordan* is a solution in search of a problem as far as the military justice system is concerned. Respectfully, even if I were to agree on the good performance of the military justice system in relation to delay, this fact does not lead to a conclusion that *Jordan* should not be applied to military tribunals. Indeed, *Jordan* is not a decision about justice systems; it is a decision about the right to be tried within a reasonable time. The target of the reform identified by the majority at paragraphs 29 and 41 is the culture of delay and complacency towards it that the *Morin* framework has not adequately addressed. The evidence produced by both parties in this application, especially the email correspondence between counsel and discussions involving counsel and the CMJ as to the timings of proceedings reveals a general lack of urgency which corresponds, to a large extent, with the complacency towards delay targeted by *Jordan*. That target is in my view relevant to the military justice system.

[8] Furthermore, the alleged good performance of the military justice system evidenced by the low number of applications for excessive delay before courts martial is not determinative when considering that the new framework developed in *Jordan* is meant to protect the right to be tried within a reasonable time prospectively, as opposed to the *Morin* framework which condemned or rationalized the delay at the back end. The new framework is intended to encourage all participants in the justice system, including the courts and even Parliament, to take preventative measures to avoid violations of the right protected by section 11(*b*). In that sense, the small number of applications at courts martial under section 11(*b*) in the past does not address the requirement for measures to promote prompt trials now and in the future. Indeed, the majority in *Jordan* recognizes, at paragraph 41, that some courts have been doing well in changing courtroom culture, maximizing efficiency and minimizing delay. Yet, the new framework, including the presumptive ceiling, is applicable to these more efficient courts as well as all others.

[9] In imposing a new framework for the section 11(*b*) analysis, the Supreme Court cannot be expected to mention every court and every existing prosecutorial authority under the many different legal instruments providing for penal consequences on persons charged. Should there have been a need to request a different treatment for accused persons under the Code of Service Discipline in the section 11(*b*) analysis, the DMP could have sought intervener status in the *Jordan* case and submit specific arguments to

the Supreme Court to that effect. That was not done and I see no reasons not to apply *Jordan* to the military justice system.

Second Question: What should the *Jordan* presumptive ceiling be in the military justice system?

[10] As mentioned, at the heart of the new *Jordan* framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling has been set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court or cases going to trial in the provincial court after a preliminary inquiry.

[11] Both parties agree that courts martial are neither provincial courts nor superior courts. Yet in arguments, counsel in turn highlighted characteristics shared between courts martial and one or the other court in an attempt to show why similarities would somehow militate for a lower or higher ceiling. I don't find these parallels to be particularly helpful simply because it appears clearly from the majority's reasons at paragraph 49 of *Jordan* that the main factor distinguishing between the 18 and 30-month ceiling is not so much characteristics of the court seized of the matter but rather whether there is a requirement to hold a preliminary inquiry. As there is no preliminary inquiry in the military justice system, the applicant argues that the ceiling which should be applicable to military tribunals is the lower, 18-month ceiling, also applicable to trials before provincial courts where cases normally go to trial without a preliminary inquiry.

[12] The respondent agrees there is no preliminary inquiry conducted in the military justice system but mentions that steps required prior to charges being preferred, that is, sent to the Court Martial Administrator (CMA) for trial by court martial, are akin to a preliminary inquiry. The representative of the DMP argued that if there needs to be a ceiling, that it be higher than 18 months, yet not necessarily as long as 30 months. When asked for more precision during oral arguments, the respondent's counsel stated that a presumptive ceiling of 24 months would be required to properly take these preliminary steps into account.

[13] In light of the position of the parties, I will consider that an 18-month ceiling is a starting point for the purpose of my analysis. To consider whether a presumptive ceiling higher than 18 months would be required, it is useful to look at how the majority in *Jordan* came to propose its presumptive ceilings at paragraphs 52 and 53. As far as the numerical value of the ceiling is concerned, two figures came into the equation. First, the period set as an administrative guideline in *Morin* to reflect limits on institutional resources. This administrative guideline was set at eight to ten months for matters proceeding exclusively in provincial court and an additional six to eight months for matters where an accused was committed to trial as a result of a preliminary inquiry. The second numeric element is inherent time requirements which the majority in *Jordan* defines as all "other factors that can reasonably contribute to the time it takes to prosecute a case." Under *Morin*, this category included "intake requirements" common

to all cases and preparation time of varying duration based on the complexity of a given case. The Court in *Morin* declined to set an administrative guideline for such an "intake period" as it is better left to trial judges more aware of conditions in a given region.

[14] In *Jordan*, the majority suggested the inherent time requirements of cases have increased since the 1992 decision of *Morin*. The ceiling imposed "takes into account the significant role that process now plays in our criminal justice system." Indeed, to arrive at a provincial court ceiling of 18 months, *Jordan* appears to have averaged out the sum of the ten to eight months of inherent time requirements with the eight to ten months institutional delay.

[15] It is difficult to transpose the two time periods constituting the presumptive ceilings in *Jordan* to the military justice system. Indeed, the CMAC in *LeGresley* refused to set a time period for either the institutional delay or for the inherent time requirements in the military justice system, mentioning an absence of sufficient evidence. In arguments, I was referred to analysis of delay by military judges in the course of 11(*b*) applications at courts martial where a period of inherent delay of six months was mentioned in *Hiebert*, 2013 CM 3006, a non-complicated case. 9 months was mentioned in the case of *Semrau*, 2010 CM 1005, a complex prosecution resulting from the alleged murder of an enemy combatant in Afghanistan.

[16] In both of these cases the court did not find any institutional delay, which is comprehensible given that there was and still is no formal process by which each party before a court martial identifies the first date at which they are respectively ready for trial. Parties typically request a date agreed on between them beforehand. It becomes then difficult to evaluate, at the back end, the period of time between the date of first availability and the moment the system can accommodate the parties. That explains why before courts martial or the CMAC that period of time was typically not evaluated or deemed not significant, the analysis focussing instead on the actions of the parties as illustrated by the analysis in *LeGresley*. In that case, a period of 15 months was held to be reasonable by the CMAC. In *Semrau*, the CMJ considered that a period of 13 months was reasonable. In *Hiebert*, d'Auteuil, M.J. found that a delay of 26 months was unreasonable and a stay of proceedings was entered.

[17] I conclude from these three cases, the only ones mentioned by the parties at the hearing of the application, that the period of total delay which would have been reasonable was much more than the period of inherent delay, even if its second component is challenging to define precisely in relation with the 18-month *Jordan* framework. Indeed, the *Jordan* framework is too different from *Morin* to equate one component of *Morin* to the new presumptive ceilings. The administrative guidelines of *Morin* cannot be imported directly as it has no specific equivalent in the military justice system. The inherent time requirements of *Jordan* departed from those of *Morin* as the majority has set a ceiling that applies to all courts in all regions and includes more time for processes than *Morin* did.

[18] The respondent focussed on the notion of processes discussed at paragraph 53 of *Jordan* and invited me to find that processes and operational conditions unique to the military justice system justify a higher ceiling than the 18 months applicable to proceedings not requiring a preliminary inquiry. Yet, I have not been convinced that unique military processes play such an important and overwhelming role in comparison to "civilian" processes that a higher ceiling would be required. I am of course aware that courts martial may be convened anywhere in the world and be composed of a panel which requires preparation before it can assemble. I am also aware that charges referred to the DMP may, on occasion, require extensive post-charge screening and further investigation before the same or other charges can be preferred for trial by court martial. Yet, mention of these factors is insufficient to justify a higher ceiling unique to the military justice system.

[19] Despite the fact that no evidence was presented on the frequency of international courts, counsel admits they are rare. Should there be delay occasioned by such a rare occurrence, it may well constitute exceptional circumstances justifying a delay above the ceiling in the *Jordan* analysis. The presumptive ceiling should not be based on exceptional occurrences.

[20] Panel courts have been in place forever and post-charge screening by an independent prosecutor has been in place since the major reform of 1998-99. No evidence was presented to me to demonstrate the time needed to perform these unique military processes and whether this period of time is more extensive now than before. No evidence of civilian processes was provided either to facilitate comparison. I find myself in the same situation as former CMAC Blanchard C.J. in *LeGresley*, when he noted that there was insufficient evidence before him to conclude on the existence of an extended inherent time requirement of five months needed to comply with all of the procedural steps unique to the military justice system. (*LeGresley*, paragraphs 39 to 47) As a consequence of this lack of evidence, the argument of the respondent is, in itself, insufficient to move me from the 18 months' starting point for a presumptive ceiling suggested by the applicant.

[21] I believe a ceiling of 18 months is entirely adequate for the military justice system. That lower ceiling is aligned with Parliament's intent as to how charges under the *NDA* should be handled, it is consistent with the purposes of the Code of Service Discipline and of military tribunals and it is better adapted to meet the objectives set out in *Jordan*.

[22] Indeed, Parliament has specifically provided for a statutory duty to act expeditiously in relation to charges at section 162 of the *NDA* which reads as follows:

> Charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

[23] In *R. v. Langlois*, 2001 CMAC 3, Décary J.A. for the CMAC noted at paragraph 14 that section 162 "restates in its own way s. 11(*b*) of the Charter" and "clearly cannot be construed so as to limit the rights conferred on an accused by s. 11(*b*)." While it is

true that the provision does not limit the rights conferred by section 11(*b*) of the *Charter*, the obligation to proceed expeditiously with charges has not been placed in the *NDA* to implement *Charter* provisions. It can be traced back to at least the 1950 *NDA*, well before the *Charter* and *Canadian Bill of Rights* and well before any specific recognition of the right to be tried within a reasonable time in Canadian human rights legislation. The purpose of this provision may not be so much the protection of those charged than the overall efficiency of the military justice system in maintaining discipline. Parliament, in passing what was in 1950 section 135 of the *NDA*, essentially recognized a duty of expediency that was and remains fundamental to military justice, having been in fact expended since then from a duty imposed on commanding officers to a duty applicable to any of the numerous actors who are involved in bringing a charge to final disposition.

[24] This statutory duty imposed by Parliament on all actors in the military justice system was discussed by Letourneau J.A. writing for the CMAC in *R. v. Grant*, 2007 CMAC 2, at paragraphs 26 and 27 in these words:

> [26] The appellant relies for his argument upon section 162 of the Act which stipulates that "charges under the *Code of Service Discipline* shall be dealt with as expeditiously as the circumstances permit". This obligation, it has been ruled by military courts, applies not only to the military police but also to military authorities at all levels. It is premised on the need to maintain discipline in the Forces and, therefore, celerity is seen as of the essence of the process: see *Corporal F. Vincent*, Permanent Court Martial, Sherbrooke, 13 October 2000, page 25.
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> [27] In *R. v. Ex-Corporal S.C. Chisholm*, 2006 CM 07, where the pre-trial delay amounted to 14 months from the time two charges of disobedience of a lawful command were laid, Commander Lamont M.J. asserted at paragraphs 14 and 15 of his reasons, in the following terms, the importance of section 162:
>
> > In the military justice system, in addition to vindicating the public right to justice, the maintenance of individual and collective discipline is of cardinal importance. Military authorities at all levels are obligated by section 162 of the *National Defence Act* to deal with charges under the Code of Service Discipline "as expeditiously as the circumstances permit."
> >
> > The unnecessary lapse of time between the commission of an offence and punishment following a trial diminishes the disciplinary effect that can be achieved only by the prompt disposition of charges. This distinguishes the system of military justice from the civilian criminal justice system where there is no disciplinary objective, nor is there any statutory obligation on any of the actors to proceed promptly at all stages of a prosecution.
>
> [Emphasis in original]

[25] I agree with those judicial pronouncements. The statutory recognition of the duty to act expeditiously in dealing with charges under the Code of Service Discipline, which to my knowledge is not present in the *Criminal Code* and other federal statutes, militates against the adoption of a presumptive ceiling that would be higher than the minimum, 18-month ceiling provided for in *Jordan*. The lower ceiling is also consistent with statements made by the Supreme Court of Canada concerning the purpose of the Code of Service Discipline.

[26] In *R. v. Généreux*, [1992] 1 S.C.R. 259, Lamer C.J. found at paragraph 31 that an accused may invoke the protection of section 11 of the *Charter* in proceedings under the Code of Service Discipline which, although "primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces . . . serves a public function [as well] by punishing specific conduct which threatens public order and welfare." That statement of purpose was recently cited with approbation by a unanimous Supreme Court in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485.

[27] In addition to commenting on the purpose of the Code of Service Discipline, Lamer C.J. dealt with the purpose of a system of military tribunals, at the often quoted paragraph 60 of *Généreux*, to the effect that:

> The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.
> (My emphasis)

[28] I find that this other judicial pronouncement from the highest court in Canada quite convincing to the effect that celerity is of the essence in the task conferred to military tribunals to maintain discipline.

[29] Finally, I see advantages in adopting a presumptive ceiling whose numerical value corresponds to one of the ceilings set in *Jordan*. Indeed, in explaining its considerations in setting presumptive ceilings, the majority stated at paragraph 55 that "the presumptive ceiling has an important public interest component. The clarity and assurance it provides will build public confidence in the administration of justice." That consideration is entirely valid and applicable to the military justice system which has seen, in the last 20 years, an increased convergence with the criminal justice system. An 18-month presumptive ceiling will be a known figure for the public. Those interested in specific cases dealt with through military tribunals will have a clear, common benchmark to assess the pace of proceedings. That, of course, includes accused persons who have an interest in a timely trial given that their liberty and security is usually engaged. It also includes witnesses, affected members of an accused's unit or victims of crimes and their families who normally have a special interest in timely completion of trials to allow them to move on with their lives. In my view, adopting the 18-month ceiling set in *Jordan* for cases going to trial without preliminary inquiry is more likely to build public confidence in the administration of military justice than the adoption of a ceiling of 24 months, unique to military tribunals.

[30] For these reasons, I find that an 18-month presumptive ceiling should be adopted to implement the *Jordan* decision in the military justice system. I believe this ceiling is entirely manageable if all participants pay attention to the direction given by the Supreme Court to justice system participants, especially at paragraphs 50 and 139 of

Jordan. This implementation of a presumptive ceiling in military justice may require adjustments in current practices. As recognized at paragraph 107 of *Jordan*, the new framework may not permit the parties or the courts to operate business as usual; however, changes to ensure timely trials are considered to be constitutionally required.

Third Question: Should a stay of proceedings be applied in this case?

[31] It is admitted by both parties that the total delay under assessment in this case is the period of 23 months and 7 days between the laying of the charges on a Record of Disciplinary Proceedings on 27 November 2014 and the expected conclusion of this trial on 4 November 2016. That takes care of the first step in the new *Jordan* framework.

[32] As for the remainder of the analysis, the positions of the parties diverge significantly. The applicant argues, in relation to step two, that no period of time has been waived and no delay has been caused by defence. Consequently, the defence contends that the length of the delay is above the 18-month ceiling, requiring the prosecution to establish discrete, exceptional circumstances to justify the delay or to demonstrate that a transitional exceptional circumstance applies to this case, as it was already in the system when *Jordan* was decided. The defence agreed in oral argument that a seven-day period corresponding to deliberations on this application for delay could be considered as the sole exceptional circumstance given the novel nature of the issue as to whether and to what extent *Jordan* should apply to the military justice system. The defence considers that no transitional circumstance could apply here as the period of delay was excessive even under the *Morin* framework. The defence specified that should I find that the total delay, minus defence delay, falls below the presumptive ceiling, no attempts are being made to establish that a stay of proceedings should nevertheless be ordered.

[33] In response, the prosecution argues that delay in this case is solely attributable to the conduct of the defence whose counsel refused numerous repeated invitations by the prosecutor to participate in scheduling teleconferences and set a date for trial and for applications to resolve disagreements over issues of disclosure. The respondent also argues that the prosecution's concerns with mounting delay were met with reassurances from defence counsel that no issues would be made concerning delay, those reassurances constituting waivers. The prosecution states that the total delay minus defence delay does not reach any applicable presumptive ceiling and that if it does, a transitional exceptional circumstance arises given that both parties relied reasonably on the law as it existed prior to *Jordan*.

[34] The question of whether a stay of proceedings should be ordered in this case can be answered solely by an assessment of the delay attributable to the defence. Both parties presented evidence pointing to all of the steps they have done to move the file along, and at the same time show why a number of steps consumed time. I do not feel the need to comment on all of those steps as this would be akin to counting trees while it is quite clear to me as to where the forest lies. Indeed, the applicant acknowledges that

on a number of occasions starting on 17 August 2015, defence counsel resisted the prosecutor's call to set a trial date. Defence argues that those refusals were justified as defence counsel had no obligation to agree on setting a trial date until he was entirely satisfied with disclosure obtained from the prosecution, a state of affairs which did not materialize until 10 March 2016, when a military judge rejected his application for disclosure. Defence argues that the presentation of the application prompted the disclosure of a relevant document on the evening of 7 March 2016, hours before the application was to be argued. As a consequence, it is argued that the application was not without merit, despite the fact that it was ultimately unsuccessful on all items that remained to be disclosed at the time it was argued.

[35] I am prepared to assume that some disclosure was late in coming from the prosecution even if some of the information requested by defence was initially not in possession of the authorities. I also have no difficulty agreeing that the defence was not *obliged* to agree to set a trial date. Yet, the issue at this point in the analysis of this application is not whether the defence was *obliged* to set a trial date, it is whether actions defence counsel chose to take generated delay that is attributable to defence. The basic principle is set out at paragraph 60 of *Jordan* to the effect that "[t]he defence should not be allowed to benefit from its own delay-causing conduct." *Jordan* also recognized, in another context, the practical reality that a level of cooperation between the parties is necessary in planning and conducting a trial. This recognition is entirely in line with the target of the new framework which is the culture of delay and complacency.

[36] In the court martial system, trial dates were and are still currently set by counsel agreeing to participate in a weekly scheduling teleconference with the CMJ at the invitation of the CMA who sends a weekly email to counsel acting in files which are preferred but not yet set for trial, along with the list of these cases and the day and time of the teleconference that week. Several email chains produced as part of exhibits in this application attest to that procedure. The teleconference is an occasion that can be used by counsel to set preliminary applications as well, as was done in this case at the 21 April 2016 teleconference, the transcript of which was produced by the applicant at Tab 41 of Exhibit M1-6.

[37] Setting a trial date in the course of the weekly scheduling teleconference does not preclude setting applications prior to the date set for trial and does not preclude hearing other applications prior to the start of the trial itself. QR&O 112.05 prescribes the order of procedure to be followed at court martial. Although proceedings begin with the opening of the court, at paragraph 2, a number of potential objections and applications are provided for at paragraphs 3, 4 and 5, before arriving at the plea, provided for at paragraph 6 of article 112.05. The trial commences when the accused pleads, as provided for at the Note to QR&O 110.10. In this case, this application is a preliminary matter heard prior to the date at which the proceedings were initially set to commence in the original convening order reflecting a start date of 17 October, a result of the 21 April 2016 teleconference. Once the issue of delay was brought to the attention of the military judge assigned to preside the trial, a date was set with counsel

for hearing that application and a new convening order was drafted reflecting the date agreed upon. The convening order is Exhibit 1 in the trial. I note that in addition to this application, I will likely hear and determine two additional preliminary matters that have been notified by defence to the CMA before the accused has to plead. I also mention that the choice of trial by Standing Court Martial did not cause delay in this case as it had become clear as early as 28 October 2015, well before the resolution of all disclosure issues, that the accused would request a change of mode of trial and the prosecution would consent.

[38] Any disclosure issue which defence wishes to raise in the context of charges preferred for court martial can be the subject of an application under QR&O 112.05(5)(*e*) prior to a plea being registered. Although the defence needs to have full disclosure before pleading to the charges, it is inaccurate to state that full disclosure is required to set a trial date. Should the defence not be in a position to plead due to late disclosure, an application for an adjournment can be made. Any delay generated by such an adjournment would not be considered defence delay under the *Jordan* framework. This relatively basic statement of court martial procedure is not new. It has been outlined many times before, including in 2010 in *Semrau*, a case produced by the applicant, where the CMJ recognized at paragraph 47 that the prosecution's obligation to disclose its case does not require that all disclosure be completed before the setting of the trial date.

[39] As an illustration of the actions of the defence and the length of the delay that it generated, I have considered the following extracts from the email correspondence to be particularly relevant:

(a) On 17 August 2015, the prosecutor asks defence counsel if he is in a position to set the matter down for trial on the basis that her calendar is quite full and she may not have availability for quite some time. Defence counsel replies the same day that he is not ready to set a date and will be asking for further disclosure;

(b) 6 October 2015, the prosecutor provides answers to a number of questions earlier asked by defence counsel, the result of a back-and-forth pertaining to disclosure which had started shortly after the initial disclosure by prosecution on 5 May 2015. She states, "I am of the view that sufficient disclosure has been made to set a trial date. Can you please indicate what dates you have available and whether you can participate in the next scheduling teleconference?" The next day, defence counsel states, "I won't be participating in this week's teleconference";

(c) On 21 October 2015, in the context of a request by the prosecution for details as to the nature of a possible disclosure application, defence counsel states, "I hope to have the application drafted by the end of the week and will get back to you";

(d) On 26 October 2015, the prosecutor replies to the 21 October email. She provides details about information requested to be disclosed and provides her availability for a hearing on the still unfiled disclosure application for two days the week of 14 December and possibly January 2016, given that she is on holidays November 6 to 29th. She states, "If this matter is going to trial, I would like to set a date. We can build the pre-trial applications into the schedule";

(e) The next day, 27 October, defence counsel replies, "If you would like to schedule, I can set it for 4 Apr 16 or after. Hopefully that would give sufficient time to have the McNeil and O'Connor applications resolved and disclosure completed";

(f) In reply to that, the prosecutor asks, "Shall we participate at the next scheduling teleconference?" Defence replies, "If not this week's conference, then next week" and adds, "I acknowledge that you may have earlier availability, but 4 Apr is the earliest I think I would be able to defend without adjournment. I would like you to commit to asking for 4 Apr or later on the teleconference. For delay, you have already put it in writing that you would be ready to go sooner, I don't think you need to raise it at the scheduling conference" In reply the same day, the prosecutor writes, "I will not oppose your request for an April 4th date";

(g) The next day, Wednesday, 28 October 2015, defence counsel writes, "I just noticed that the teleconference this week is on Friday and I am going to be away. I am around all next week though";

(h) On 3 November 2015, a Tuesday, the prosecutor writes, "I know we discussed waiting on dates but I think it would be best to go ahead and book the trial dates. If we book in April, we'll have lots of time to sort out the disclosure issues. As time goes on, my calendar is getting booked." In a reply the next day, Wednesday, 4 November, defence counsel writes, "I think it would be more efficient to set a trial date after you return from your holidays." The same day, the prosecutor replies that she would still like to book the trial date "this week" and mentions that she is still waiting for the disclosure application material promised for shortly after 21 October;

(i) Still on 4 November 2015, defence counsel sends the CMA and the prosecutor his notice relating to a disclosure application with a request that it be heard on 14 December in Victoria, British Columbia. Later on that date, the prosecutor writes in reply that she is available the next day to attend a scheduling conference to set a trial date and to schedule the disclosure hearing for early in the New Year. In replying to that email defence counsel states to the CMA, "I have not agreed to set a trial date

> and will not be doing so," adding that the prosecutor would need to make an application to set a trial date.

[40] I conclude from this evidence that, in this case, defence counsel chose a course of action in refusing to agree to set a trial date until he had gotten what he considered to be full disclosure. That refusal of defence counsel to set a trial date before he was entirely satisfied with the state of disclosure was unreasonable and vexatious. Any delay resulting from these actions is, therefore, the responsibility of the applicant.

[41] Those repeated refusals by defence counsel to set dates have most certainly delayed the setting of the trial date significantly, as participation in a scheduling conference as early August 2015 was possible. Two months later, in October 2015, the evidence reveals that it would have been possible for counsel to ask for a two-week trial to begin almost 6 months later, on 4 April 2016. I am fully aware that the evidence does not give the full picture of judicial availability on 4 April 2016, a date that was never actually suggested as it should have been at the end of October 2015. Yet, *Jordan* provides, at paragraphs 64 and 65, that first instance judges are uniquely positioned to gauge the legitimacy of defence actions and that it is open to them to find that defence actions or conduct have caused delay.

[42] On that basis, I am confident to find that the flat out refusal by defence counsel to set a trial date, which would have been 4 April 2016, was unjustified. I can infer, using my experience, that counsel asking the CMJ for a date almost 6 months away will have that date granted, an inference supported by the content of the very short 21 April scheduling teleconference at Tab 41 of Exhibit M1-6 where the CMJ readily agreed to set this trial for two weeks starting on 17 October, almost six months after that teleconference. Even with the hearing of the disclosure application as it actually occurred on 8 March 2016, a trial on 4 April 2016 would still have been possible if defence counsel had not refused to set a trial date. From the evidence, confirmed during oral hearing, it appears that no significant disclosure steps have been taken since March 2016. No third party disclosure application is forthcoming, even if the essence of the military judge's decision dismissing the disclosure application was that a third party disclosure application was required in order to obtain the evidence defence counsel had been requesting. It is unfortunate that the prosecution did not see fit to press on with a set date application in light of the position of the defence. Yet, the prosecution has shown repeatedly its availability and desire to set the matter for trial through the mechanism provided for by the CMA and was met with unreasonable refusals and repeated delaying responses.

[43] I conclude, therefore, that this trial could have been ended by 15 April 2016 if it was not for the actions of defence. This is less than 17 months from the time the charge was laid on 27 November 2014. Consequently, the presumptive ceiling of 18 months has not been breached and no further analysis is required, as the applicant has clearly stated he is not asking for a stay of proceedings should the Court find that the total delay, minus defence delay, falls below the presumptive ceiling.

[44] I wish to state that even if I had not attributed the delay to defence at the second step of the *Jordan* analysis, I would have found that the exchange between counsel demonstrates a reasonable reliance on the law as it existed prior to *Jordan* and constitutes a transitional exceptional circumstance justifying the delay in this case. Indeed, the prosecution is not held to perfection and the repeated written demands met by written refusals were sufficient to attribute the delay to the defence under the *Morin* framework. In the absence of prejudice and considering the gravity of the offences alleged, it was not unreasonable for the prosecution to rely on the law as it existed to conclude that the time the case was taking was justified.

[45] Both *Jordan* and *Morin* before it have recognized that section 11(*b*) was not intended to be a sword to frustrate the ends of justice. Allowing the accused to avoid responsibility after having embraced delays to the extent seen in this case would frustrate the interest of the public for a trial on the merit to the detriment of our system of justice, generally, and military justice, specifically.

FOR THESE REASONS, THE COURT:

[46] **DISMISSES** the application.

Counsel:

Lieutenant-Commander B.G. Walden and Major B.L.J. Tremblay, Defence Counsel Services,
Counsel for Leading Seaman C.R. Thiele (Applicant)

The Director of Military Prosecutions as represented by Lieutenant-Commander S.C. Leonard and Lieutenant-Commander S. Torani,
Counsel for Her Majesty the Queen (Respondent)