COURT MARTIAL

Citation: *R. v. Cubias-Gonzalez,* 2017 CM 3003

Date: 20170202
Docket: 201606

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Private E.M. Cubias-Gonzalez, Applicant

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

REASONS ON APPLICATION MADE BY THE ACCUSED PURSUANT TO SUBPARAGRAPH 24(1) AND 11(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

INTRODUCTION

[1] Private Cubias-Gonzalez is charged with one offence punishable under paragraph 130(1)(a) of the *National Defence Act* (*NDA*) for aggravated assault contrary to section 268 of the *Criminal Code*, with one offence for drunkenness contrary to section 97 of the *NDA*, and with one offence for having used provoking speeches towards a person subject to the Code of Service Discipline, tending to cause a quarrel, contrary to subsection 86(b) of the *NDA*.

[2] At the opening of this trial by Standing Court Martial on 5 December 2016, by way of an application made pursuant to subparagraph 112.05(5)(e) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), and for which a notice in writing was received by the Office of the Chief Military Judge on 22 August 2016, Private Cubias-Gonzalez indicated that he was seeking an order from the presiding

military judge for a stay of the proceedings pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* for an alleged infringement of his right to be tried within a reasonable time guaranteed under subsection 11(*b*) of the *Charter*.

[3] Mainly, the applicant is claiming that the delay of 25 months representing the time between the time the charges were laid, on 11 February 2015 and the anticipated end of this court martial, on 17 March 2017, is unreasonable. According to the applicant, this overall delay is above the presumptive ceiling of 18 months established by the Supreme Court of Canada in its recent decision of *R. v. Jordan*, 2016 SCC 27, and he is of the opinion that the prosecution is unable to prove exceptional circumstances that would justify such delay.

[4] The evidence on this application consisted of the testimony of the prosecutor who made the preferral of the charges before this Court, Major Philippe Doucet, and of two statutory declarations, one affidavit, and a number of documents, mainly emails and letters in support of those statutory declarations and affidavits.

[5] It is alleged that on 11 September 2014, Private Cubias-Gonzalez was involved in an incident with Private Narula at or near Kingston, province of Ontario. An investigation took place. Private Cubias-Gonzalez was arrested while he was on a course on 23 September 2014 and released with conditions by the Custody Review Officer on 25 September 2014. He was also removed from the course he was on.

[6] On 11 February 2015, three charges were laid against Private Cubias-Gonzalez. Those charges were assault causing bodily harm contrary to section 267 of the *Criminal Code*, drunkenness contrary to section 97 of the *NDA* and used provoking speech towards a person subject to the Code of Service Discipline tending to cause a quarrel contrary to section 86 of the *NDA*.

[7] On 16 February 2015, Lieutenant-Colonel Cloutier, Deputy Director Defence Counsel Services, informed the Director of Military Prosecutions that Major Hodson would represent Private Cubias-Gonzalez and requested full disclosure about the matter.

[8] On 19 March 2015, the application for the referral of the charges by the Referral Authority was received by the Director of Military Prosecutions.

[9] On 23 March 2015, a prosecutor was assigned to the file. It was reassigned later to Major Doucet who received it at his office on 21 April 2015.

[10] Between the end of the month of April and the beginning of the month of June, Major Doucet was in court, on training or on leave. He spent about two weeks at the office during that period.

[11] On 3 June 2015, Major Hodson inquired for the first time by email about the preferral of charges by Major Doucet and requested disclosure.

[12] On 24 June 2015, Major Hodson's legal assistant informed Major Doucet by email that Major Hodson was ready to set a date for the trial.

[13] Between 25 June and 15 July 2015, Major Hodson and Major Doucet exchanged emails in order to find a proper moment to discuss the case. Major Hodson was still requesting disclosure at that point.

[14] On 10 July 2015, Major Doucet's administrative assistant requested full disclosure from the Military Police in Kingston.

[15] Private Cubias-Gonzalez was released from the Canadian Armed Forces during the month of July 2015.

[16] On 14 August 2015, Major Doucet informed Major Hodson that further to the review of the case, he requested further investigation from the investigator.

[17] As he mentioned in his testimony before the Court, Major Doucet made consideration for preferring a more objectively serious charge, which is aggravated assault, instead of the one initially laid for assault causing bodily harm. However, in order to have a reasonable prospect of conviction, he explained that the essential element of identity for that offence would rely exclusively on circumstantial evidence, the alleged victim being unable to recall who hit him. Essentially, Major Doucet considered that expertise would confirm that because of the nature of the injuries, it would provide evidence to identify that they would have been the result of being hit by somebody, such as Private Cubias-Gonzalez, and not a result of an accident.

[18] On 18 August 2015, the investigator attempted to identify an expert.

[19] Major Hodson disputed the necessity of such expertise and raised the issue of delay. He invited the prosecutor to set a date for trial in his email dated 19 August 2015.

[20] On 21 August 2015, a letter from the prosecutor was sent to the investigator as a formal request for additional investigation in the matter of Private Cubias-Gonzalez. Response had to be provided no later than 22 September 2015.

[21] On 25 August 2015, statements made by Private Narula in the course of the summary investigation in relation to the injuries he sustained were sent by mail to Major Hodson.

[22] On 1 September 2015, full disclosure was sent by the prosecutor to Major Hodson.

[23] On 2 September, Major Doucet followed up on his request for an expert. Having concerns about the delay, Major Hodson informed Major Doucet that he would like to schedule a trial date as soon as possible.

[24] The day after, Major Doucet replied that it was expected that the conclusion for additional investigation would be provided no later than 22 September 2015 for ordinary witnesses. He also mentioned that for an expert witness, it could take a little longer.

[25] On 21 September 2015, the investigator informed Major Doucet that the neurosurgeon who treated the alleged victim would most likely be able to act as an expert witness.

[26] Still concerned by the delay, another email was sent on 29 September 2015 by Major Hodson's legal assistant requesting the matter to be preferred immediately.

[27] The day after, Major Doucet replied that no preferral of charges would occur until he received the result of his request for additional investigation.

[28] On 16 October 2015, Major Hodson reiterated his concerns about delay in an email to Major Doucet. He warned him about their respective availability for the next 6 months and suggested to have charges preferred as soon as possible in order to set a trial date.

[29] On 20 October 2015, the prosecutor reiterated by email his position of preferring charges only once additional investigation results would be available. Major Hodson replied almost immediately by warning the prosecutor about delay, highlighting the fact that his client was not waiving his right to be tried within a reasonable time pursuant to subsection 11(*b*) of the *Charter*. The prosecutor acknowledged receipt of his reply but said that he had nothing to add to what he said previously.

[30] On 21 and 28 October 2015, Major Doucet tried to reach by email the neurosurgeon. He was unsuccessful. On 3 November 2015, he asked the investigator to help him to track him down. However, he learned that the investigator took her release from the Canadian Armed Forces.

[31] Then, Major Doucet asked for assistance from a Reserve Force prosecutor who is also a Crown Attorney in Ontario in order to identify an expert. He contacted her on 30 November 2015.

[32] On 3 December 2015, Major Doucet was provided with an extensive list of expert witnesses. On 17 December 2015, he contacted the Reserve Force prosecutor to get contact information.

[33] It is on 13 January 2016 that Major Doucet started to identify an expert witness by contacting some of them. On 20 January 2016, he found one who accepted to act as an expert witness and provide a report regarding the matter before this Court.

[34] On 25 January 2016, Major Hodson sent an email to Major Doucet reminding him about the delay in the case and that he was ready to set a date for trial. He also

asked for the expert report, if it exists. In reply, Major Doucet wrote him that an expert was identified and as soon as the expert report is received, he would prefer charges, probably in March, on his return from sick leave.

[35] On 3 February 2016, the expert confirmed that he received the necessary material and provided a time and cost estimate. However, he was told that he could not start working until the contract had been approved.

[36] Further to some changes made, the Director of Prosecutions Services was provided with the contract for his signature on 18 March 2016 and a signed copy was provided to the prosecutor on 21 March 2016.

[37] During the month of April 2016, various exchanges occurred between the prosecution and the expert. On 27 April 2016, the prosecutor was informed that the report was ready and it was read to him on the phone by the expert.

[38] On 8 April 2016, Major Hodson asked by email to the prosecutor to prefer or withdraw the charges, considering the delay in this matter. If the matter ever reaches trial, then the delay would be addressed through an Askov application that he will present to the Court.

[39] On 27 April 2016, Major Hodson sent an email to Major Doucet about his decision to prefer or not charges.

[40] Major Doucet preferred charges on 3 May 2016 and he informed Major Hodson by email on the same day about that fact.

[41] On 4 May 2016, Major Hodson requested disclosure of the report before setting any trial date. On 9 May 2016, Major Hodson was provided with a scanned copy of the report

[42] On 13 May 2016, Major Hodson was provided with the will-say from the prosecution.

[43] On 16 May 2016, Major Hodson confirmed that he would present an application about the violation of the right of his client to be tried within a reasonable time (Askov application), that he was considering consulting an expert and that he was ready to set a trial date.

[44] On 26 May 2016, a trial date was set for this trial on 19 September 2016 for a period of two weeks.

[45] Between 27 May and 1 June 2016, discussions occurred between parties about additional disclosure.

[46] On 7 June 2016, Private Cubias-Gonzalez chose to be tried by a Standing Court Martial.

[47] On 8 June 2016, the court martial was convened by the Court Martial Administrator for 19 September 2016.

[48] On 2 August 2016, Major Hodson informed prosecution that he would not retain the service of an expert.

[49] On 23 August 2016, I held a pre-trial conference call with counsel on this matter in order to discuss the *Charter*'s preliminary application and some trial matters for case management purposes.

[50] On 16 September 2016, I held a second pre-trial conference where I informed counsel that I was unable to preside at any court martial for the next two weeks. I inquired about their respective availability and I told them that I would pass this information to the Chief Military Judge. I was also informed that Major Doucet, the one who signed the statutory declaration in support of Respondent's evidence, would not be available as a witness for the trial between 30 September and 7 November 2016. I was informed that it was not the intent of the Respondent to call him as a witness, but rather the Applicant that required him to appear as a witness in court in order to be cross-examined on his Statutory Declaration.

[51] Once informed of the situation, the Court Martial Administrator rescinded the Convening Order issued on 8 June 2016.

[52] On 25 October 2016, I held a pre-trial conference call with counsel where dates were discussed for the trial. Then, it was agreed to proceed with the preliminary application on the week of 5 December 2016 and if a trial would proceed, then to do it from 6 to 17 March 2017. These dates were discussed and agreed to pursuant to the availability of counsel, the presiding military judge and the witness.

[53] On 28 October 2016, a Convening Order was signed by the Court Martial Administrator, setting a trial date on 5 December 2016.

[54] On 30 November 2016, I held a pre-trial conference where I discussed with counsel about the manner in which to proceed on the preliminary application.

[55] On 5 and 6 December 2016, I heard this preliminary application.

[56] Section 11(*b*) of the *Charter* reads in part as follows:

> 11. Any person charged with an offence has the right
>
> . . .

(b) to be tried within a reasonable time;

[57] To determine if there has been an unreasonable delay in trial proceedings, contrary to subsection 11(*b*) of the *Charter*, the Supreme Court of Canada decided on 8 July 2016 that a change of direction was required and set out a new framework for applying subsection 11(*b*) of the *Charter* in its decision of *R. v. Jordan*, 2016 SCC 27.

[58] The applicable test is as follows:

(a) The court must calculate the total number of months from the time a charge is laid to the anticipated completion of the trial;

(b) The court must subtract the number of months waived by the defence or caused by the defence;

(c) If the remainder is more than 30 months in superior court, more than 30 months in provincial court after a preliminary hearing, or more than 18 months in provincial court without a preliminary hearing, the delay is presumptively unreasonable. The onus then shifts to the prosecution to justify the delay due to exceptional circumstances; if it does not, subsection 11(*b*) of the *Charter* is violated;

(d) If the remainder is below the relevant ceiling, the defence must demonstrate that the delay was nonetheless unreasonable to demonstrate a subsection 11(*b*) *Charter* violation.

[59] The minimum remedy for a subsection 11(*b*) *Charter* violation is a stay of the proceedings as stated in *R. v. Rahey*, [1987] 1 S.C.R. 588.

[60] Then, the first question to answer in the context of such application is the following one: should *Jordan* be applied to this case?

[61] Reality is that it is the applicable law and it is binding on this Court. It only constitutes a new framework for the analysis of an infringement of the right of a person to be tried within a reasonable time.

[62] Section 162 of the *NDA* imposes on the actors within the military justice system, once a charge is laid, to act expeditiously with charges "as the circumstances permit". Essentially, as stated by the Court Martial Appeal Court at paragraph 14 in *R. v. Langlois*, 2001 CMAC 3, this section "restates in its own way subsection 11(*b*) of the Charter".

[63] In *R. v. Grant*, 2007 CMAC 2, the Court Martial Appeal Court went further when it said at paragraphs 26 and 27:

> [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.
>
> [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]

[64] Reality is that it just reflects what was said earlier by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 SCR 259, at page 293:

> 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.
> [Emphasis added]

[65] The essence of the message from courts is that timely trials are important to the maintenance of discipline within the Canadian Armed Forces, and to maintain confidence of those subject to the Code of Service Discipline, and the public in general, in the administration of military justice.

[66] The Supreme Court of Canada in *Jordan* clearly established the presumptive ceiling for a case going to trial in a Superior Court and in a Provincial Court after a preliminary hearing, which is 30 months, and for a case going to trial in a Provincial Court without a preliminary hearing, which is 18 months. However, there was nothing said about a case going to trial in a court martial.

[67] So, what should be the presumptive ceiling for the analysis of a case going to trial in a court martial?

[68] I proceeded with a hearing on this specific issue at the opening of the *voir dire* on this application on 5 December 2016 and delivered my decision on this specific issue on the day after in order to indicate to counsel how the burden would result on them about this matter.

[69] As a matter of fact, the Supreme Court of Canada made it clear that the presence of procedures such as a preliminary hearing deserved an additional 12 months to the 18 months set initially.

[70] The applicant's position is that the presumptive ceiling for a case going to trial in a court martial should be 18 months, and alternatively, 12 months if possible.

[71] The respondent suggested that based on current statistics, and in order to avoid chaos caused to the system of courts martial, it suggested that the presumptive ceiling for a case going to trial in a court martial should be 24 months. Alternatively, if considered necessary by the Court, the prosecution suggested that 18 months could be considered.

[72] Essentially, according to *Jordan*, the presumptive ceiling is the result of a calculation of the inherent delay added to the institutional delay.

[73] In the decision of the Court Martial Appeal Court of *R.* v. *LeGresley*, in order to accept a necessary delay as inherent in a military context, it must be established in the evidence (see paragraph 46 of the decision).

[74] In this case, through an affidavit of Ms. Angela Douma dated 12 September 2016, the Respondent submitted statistics for a variety of court martial cases about the number of days between the time a charge is laid to the time when such charge is preferred. There were also various other statistics on delays between different time frames for processing a charge, such as the time between the laying of a charge up to the time of the completion of a trial.

[75] However, as noted in *LeGresley*, no explanation was provided about the rationale for all those delays. Without such explanation, it is difficult for the Court to have a proper understanding of the reasons behind those requirements.

[76] Then, the Court is left with no rational explanation for the delays as suggested by the parties, other than some statistics.

[77] I had the opportunity to read the reasons of military judge Pelletier in his decision of *R. v. Thiele*, 2016 CM 4015, issued on 24 October 2016 and on the matter of the applicable presumptive ceiling, and I do not see any reason that would lead me to conclude differently from him on this issue.

[78] Considering the absence of any preliminary hearing, I have no reason to conclude that the presumptive ceiling of 18 months imposed by the Supreme Court of Canada for a case before a Provincial Court could not be considered for a case heard by a court martial. As mentioned by judge Pelletier in *Thiele* at paragraph 30, such requirement would be proper to implement the *Jordan* decision in the military justice system.

[79] In addition, a quick review of decisions delivered by military judges over the period of 2004 to 2013, and attached as an Annex to this decision, revealed the following facts:

(a) A range of a 9 to 26-month delay was considered by the military judiciary enough to proceed with a further inquiry about reasonableness of the delay;

(b) When the court faced a delay of 22, 23 and 26 months, it was considered by courts martial as a violation of subsection 11(*b*) of the *Charter* and resulted in a stay of proceedings;

(c) In one case involving a 16-month delay, and another case involving a 14-month delay, stays of the proceedings were granted because of the nature of the prejudice;

(d) In all other cases, despite the delay, the court decided that there was no violation of the right of the accused to be tried within a reasonable time. It mostly involved cases with 9 to 18-month delays.

[80] Then, the 18-month presumptive ceiling from *Jordan* appears in line and consistent with the approach taken by the military judiciary's comments on the issue of delay in a recent past, where an analysis was required under the criteria established in *R. v. Morin*, [1992] 1 S.C.R. 771.

[81] The Court will apply this 18-month presumptive ceiling for the analysis of the application in this case.

[82] Applying the test enunciated in *Jordan*, the first step for this Court is to calculate the total number of months from the time the charges were laid to the anticipated completion of the trial. Charges were laid on 11 February 2015 and the anticipated end of the trial is 17 March 2017. Then, the overall delay is 25 months.

[83] The second step is to find out if any time is attributable to the Applicant, which would automatically reduce the overall period considered for the analysis. It could be any delay waived by the defence or delay caused by:

(a) deliberate and calculated defence tactics;

(b) not being ready to proceed when the court and the prosecution are ready;

(c) other defence conduct or action as found by the trial judge.

[84] In this case, there is no evidence as a matter of delay that can be put on Private Cubias-Gonzalez.

[85] The remaining delay being 25 months, then it is above the presumptive ceiling of 18 months determined by this Court. As a result, the delay is presumptively unreasonable and the burden shifts to the prosecution to justify the delay as having been due to exceptional circumstances.

[86] In order to be exceptional, the circumstances must have been reasonably unforeseen or reasonably unavoidable. Circumstances do not need to be rare or entirely uncommon (*Jordan*, at paragraph 69). There are two broad categories of exceptional circumstances:

(a) Discrete and exceptional events, including medical or family emergencies affecting the accused, witnesses, counsel or the trial judge, or exceptional events that arise at trial such as a complainant's unexpected recantation. Cases with international issues such as extradition may also qualify as having exceptional circumstances;

(b) Particularly complex cases which involve voluminous disclosure, large numbers of witnesses, significant expert evidence, charges covering long periods of time; large numbers of charges, pre-trial applications, novel or complicated issues and large numbers of issues in dispute.

[87] Due to some kind of unexpected issue affecting the trial judge and passed on to parties on 16 September 2016, the matter initially scheduled on 19 September 2016 had to be rescheduled for another date.

[88] It was clearly unexpected and constitutes in my opinion, an exceptional event to be subtracted from the overall period. The matter was rescheduled by means of a conference call that occurred with both parties at the end of October 2016, considering the unavailability of Major Doucet for the month of October and beginning of November 2016. Then, during this conference call, an agreement was made to proceed on the week of 5 December 2016 for the preliminary application, and between 6 and 17 March 2017 for the trial, if any. It resulted in adding five months to delay that must be subtracted from the overall delay.

[89] Then, the overall delay is reduced to 19 months, which is still over the presumptive ceiling of 18 months.

[90] The Respondent claimed that it was a complex case that required significant expert evidence. To the contrary, the Applicant clearly stated, as he has claimed it since the matter is with the prosecution, that it is not a complex case.

[91] It has been demonstrated clearly by the Respondent that it was necessary to get expert evidence in order to determine if there was some evidence on the essential element of identity about the main charge of aggravated assault, and to make any conclusion regarding the existence of a reasonable prospect of conviction.

[92] Despite the fact that this piece of evidence was clearly required, it does not make the case a complex one.

[93] What seemed to be complex was more related to the way to get that evidence. The preferral package was received in March 2015 by the prosecution and a first prosecutor was assigned to the case. In April 2015, a second prosecutor was assigned to the case and was provided with the file.

[94] However, it is further to a review of the case in August 2015 that the prosecutor made the decision of requesting additional investigation on the matter, because he gave consideration to modify the charge of assault causing bodily harm for the most objectively serious one of aggravated assault.

[95] Meanwhile, in June 2015, Major Hodson, on behalf of Private Cubias-Gonzalez, requested from the prosecutor to proceed with the preferral of charges in order to set a trial date as soon as possible. He reiterated his request at the end of the same month.

[96] However, it is in January 2016 that the prosecutor was successful in identifying an expert that could assist him in the case. Basically, it took him five months to achieve that. The evidence has shown that he conducted business as usual by being in court, at the office, under training or on leave, while Major Hodson requested on three different additional occasions from the prosecutor to prefer charges in order to set a trial date. He also warned him about a possible *Askov* application. At no time, did the prosecutor do anything special in order to expedite the matter or to request assistance to proceed with the file at a different pace. The end result is that it took 14 months for the prosecution to prefer charges in this case. I also note that it took about six months after the initial request made by the Deputy Director of Defence Counsel Services before the prosecution proceeded with any disclosure to defence counsel.

[97] Reality is that the way to get the evidence for the prosecutor to make a decision was not complex. He simply did not change anything in his conduct to make any step faster. Major Doucet mentioned that during that period of time, he did not feel overwhelmed by his caseload. Then, I would agree with the Applicant, as he suggested it to the court, that this case is not complex.

[98] Considering that the present case falls clearly in the one for which the two transitional exceptional circumstances mentioned in *Jordan* would apply, because the

matter was convened in May 2016, which is just some time before the decision in *Jordan* was delivered, I must proceed to such analysis.

[99] First, where the prosecution proves that the time the case has taken is justified based on the parties' reasonable reliance on the pre-*Jordan* law, this reliance will constitute a "transitional exceptional circumstance" justifying delay over the ceiling.

[100] Major Doucet told the court that he considered that an overall delay of about 15 months would attract scrutiny from a court martial under *Morin*'s applicable criteria. However, he was under the impression that it would not result in a stay of proceedings.

[101] The applicant said that as a matter of prejudice under *Morin*, the fact that he is released from the Canadian Armed Forces since July 2015 and that it is a case depending essentially on the memory of witnesses, would qualify both issues as such. In particular, considering that memory fades as time elapses, longer is the delay to deal with the matter, worse is the ability of witnesses to recall.

[102] The prosecution did not reasonably rely on the pre-*Jordan* law applicable at that time. The prosecutor was fully aware that the case would be heard close or past those 15 months he considered as being the applicable delay, and despite the numerous requests and warnings made by defence counsel, he did nothing to mitigate the potential prejudice to the accused that would result from the impact of the delay, especially the one concerning the memory of witnesses, and to a lesser extent, the one about the impact on his life as a former member of the Canadian Armed Forces.

[103] Then, it is my conclusion that the prosecutor's reliance on the previous state of the law was unreasonable. This transitional exceptional circumstance cannot find any application in this case.

[104] A second "transitional exceptional circumstance" is the existence of significant institutional delay problems in the jurisdiction in question. Where the case is of moderate complexity in a jurisdiction with notorious institutional delays, the judge should consider that the prosecutor's behaviour will be constrained by those delays.

[105] As a matter of fact, there is no evidence that there is a notorious institutional delay concerning courts martial. This matter was preferred by prosecution in May 2016 and a trial date was set almost immediately for the month of September of the same year, which is only four months after charges were preferred.

[106] It is the conclusion of the Court that the prosecution has proved the existence of some exceptional circumstances. However, it could not reasonably remedy or prevent the delays resulting from those circumstances because these exceptional circumstances occurred after a 19-month overall delay.

[107] Then, the Court concludes that the delay is unreasonable and that the right of Private Cubias-Gonzalez to be tried within a reasonable time has been violated.

[108] Considering the conclusion of this Court on the violation of the constitutional right of the accused to be tried within a reasonable time, the Court has no other choice, as the minimum remedy, to direct a stay of the proceedings on all charges.

FOR THESE REASONS, THE COURT:

[109] **GRANTS** the application of the Applicant.

[110] **DECLARES** that the right of the Applicant under subsection 11(*b*) of the *Charter* to be tried within a reasonable time about the charges on the charge sheet has been violated.

[111] **DIRECTS** that, pursuant to subsection 24(1) of the *Charter*, the proceedings of this Standing Court Martial in respect of Private Cubias-Gonzalez be stayed.

Counsel:

The Director of Military Prosecutions as represented by Major A. van der Linde and Captain M.-A. Ferron

Mr D.M. Hodson and Diana Mansour, 16 Lindsay Street North Lindsay, Ontario K9V 1T4

and

Captain P. Cloutier, Defence Counsel Services
Counsel for Private Cubias-Gonzalez

ANNEX

DECISIONS FROM COURTS MARTIAL ON AN APPLICATION MADE BY AN ACCUSED PURSUANT TO SUBPARAGRAPH 24(1) AND 11(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ALLEGED INFRINGEMENT OF HIS RIGHT TO BE TRIED WITHIN A REASONABLE TIME

NAME	REFERENCE	DELAY (MONTHS)	RESULT
Thiele	2016 CM 4015	23	Dismissed (new framework for analysis, delay caused by accused)
Hiebert	2013 CM 3006	26	Granted (delay caused mainly by chain of command)
Semrau	2010 CM 1005	18	Dismissed
Mills	2008 CM 4011	20	Dismissed
Rompré	2008 CM 4009	16	Dismissed
Benoît	2008 CM 1010	14	Dismissed
Quinn	2007 Cm 3017	18	Dismissed
Gibbons	2007 CM 1021	16	Dismissed
Rioux	2007 CM 2011	23	Granted (Impact on recovery from PTSD)
Fenwick-Wilson	2007 CM 4021	16	Dismissed
Lelièvre	2007 CM 1012	16	Granted (prejudice: promotion delayed by several months)
Brause	2007 CM 2007	22	Granted (Impact on recovery from PTSD)
Robert	2007 CM 4013	12	Dismissed
McRae	2007 CM 4004	15	Dismissed
LeGresley	2006 CM 39 and 2008 CMAC 2	15	Dismissed
Jollimore	2006 CM 2016	15	Dismissed
Grant	2006 CM 11 and 2007 CMAC 2	12	Dismissed
Chisholm	2006 CM 07	14	Granted (Impact on PTSD symptoms)
Wolfe	2005 CM 48	9	Dismissed
Khan	2004 CM 14	9	Dismissed