COURT MARTIAL

Citation: *R. v. W. (T.S.)*, 2017 CM 2012

Date: 20171208
Docket: 201702

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Master Corporal T.S.W., Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

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DECISION ON RESPONDENT'S MOTION TO SUMMARILY DISMISS ACCUSED'S APPLICATION SEEKING REDRESS UNDER SUBSECTION 24(1) OF *THE CANADIAN CHARTER OF RIGHTS AND FREEDOM* FOR BREACH OF RIGHTS GUARANTEED UNDER SECTIONS 7 AND 11(*b*)

(Orally)

Introduction and Background

[1] On 6 September 2015, in Lviv, Ukraine, the applicant was arrested for allegations related to four disciplinary offences. He was not charged at that time and was released without conditions.

[2] Three days later, on 9 September 2015, the applicant was arrested a second time, but this time it was for alleged criminal offences, not directly related to the disciplinary offences for which he had been arrested three days earlier. He was released again, later that same day, with restrictive conditions set by a custody review officer. Once again, at that time, he was not formally charged with any offences.

[3] Although the applicant's custody conditions have been varied slightly in the intervening months, the applicant argued that he remained subject to significant and limiting conditions imposed from 9 September 2015 until these proceedings. Two of the release conditions imposed the following:

(a) Restriction on access to information technology (IT); and

(b) Prohibition of unsupervised contact with anyone under the age of 16.

[4] On 28 April 2016, Master Corporal T.S.W. was charged with 10 offences flowing from the incidents that gave rise to his earlier arrests on the 6th and 9th of September, 2015. Four charges flow from incidents that occurred on or about the 5th and 6th of September, 2015 in Lviv, Ukraine for which he was charged under section 83 of the *National Defence Act* (*NDA*) for disobeying a lawful command of a superior officer; section 129 of the *NDA* for conduct to the prejudice of good order and discipline; section 90 of the *NDA* for absenting himself without leave; and section 97 of the *NDA* for drunkenness. In addition, he was charged with six charges under section 130 of the *NDA*; one charge for making child pornography, contrary to section 163.1(2) of the *Criminal Code* (*Cr. C.*); one charge for sexual interference, contrary to section 151 of the *Cr. C.*, one charge for sexual assault, contrary to section 271 of the *Cr. C.*, two counts of charges for possession of child pornography contrary to section 163.1(4) of the *Cr. C.* and one charge for voyeurism, contrary to section 162(1)(a) of the *Cr. C.*

[5] On 16 January 2017, the prosecution preferred the charges laid on 28 April 2016.

[6] On 19 October 2017, due to a breakdown in the solicitor-client relationship, the applicant sought a change of counsel which was granted. During the application to change defence counsel, Mr Fowler, the proposed counsel to replace the defence counsel on record, indicated that he anticipated the requirement to make multiple applications under the *Canadian Charter of Rights and Freedoms*. There was no significant delay associated with the applicant's change of counsel.

[7] The applicant alleges that the:

(a) IT restriction limited the applicant's ability to communicate with counsel, for both family law, as well as Code of Service Discipline matters, and that it limited his ability to perform any meaningful functions for the Canadian Armed Forces (CAF); and

(b) Restriction limiting his contact with children under the age of 16 forced the applicant to surrender custody of his minor son, to the applicant's ex-wife. Prior to the imposition of the release condition, the applicant had sole custody of him.

[8] The applicant made two requests to relax the release custody restrictions. Although the applicant was granted supervised IT access to the Defence Wide Area Network that permitted him to perform some CAF duties; it did not improve his ability to communicate with his legal counsel, as he did not have the requisite privacy to engage in meaningful solicitor-client discussions. In response to both of the applicant's requests to relax the conditions, the commanding officer of his unit refused to relax the restriction that stipulated that he not be alone around children under the age of 16, which effectively prevented the applicant from regaining custody of his minor son.

Applications

[9] On 15 November 2017, pursuant to article 112.05(5) (e) of the *Queen's Regulations and Orders for the Canadian Forces*, Master Corporal T.S.W. brought a notice of application seeking a stay of proceedings under section 24(1) of the *Charter* as remedy for an alleged infringement of his right to be tried within a reasonable time as guaranteed by section 11(b) of the *Charter*. He further alleged that the infringement of his section 11(*b*) right was aggravated by an abuse of process, for a violation of his right to liberty and security of the person guaranteed under section 7 of the *Charter*.

[10] On 30 November 2017, the respondent filed a notice of motion (amended 4 December 2017) in response to Master Corporal T.S.W.'s notice of application. The respondent seeks an order dismissing the portion of Master Corporal T.S.W.'s application that alleges abuse of process related to the restrictions placed upon Master Corporal T.S.W. when he was released from custody. Alternatively, the respondent requested that the portion of the application related to section 11(*b*) of the *Charter* (hereinafter, the *Jordan* application) be heard first and separated from the rest of the application related to the allegations of prejudice. The respondent requested that this second portion of the application be heard after the verdict, should the applicant be found guilty of any charge.

[11] On 4 December 2017, Master Corporal T.S.W. filed a response to the respondent's notice of motion, seeking an order to dismiss the respondent's motion to strike the applicant's pleadings relating to section 11(*b*) of the *Charter*.

[12] At the opening of this Standing Court Martial on 6 December 2017, prior to the plea and after the oath had been taken, the Court heard the respondent's motion for an order dismissing that portion of the accused's application related to the alleged abuse of process.

Issue

[13] The Court must decide whether to allow evidence and argument on the accused's notice of application seeking a stay of proceedings under section 24(1) of the *Charter* for an alleged violation of the accused's section 11(*b*) rights, as aggravated by the infringement of his section 7 right to liberty and security of the person and abuse of process.

[14] In short, the central issue is whether prejudice flowing from pre-charge delay should be added to the post-charge delay in assessing the constitutional timeliness of the applicant's trial under section 11(*b*).

Evidence

[15] The evidence before this court martial on this application is composed of the following:

(a) Convening Order (Exhibit 1);

(b) Charge Sheet (Exhibit 2);

(c) Notice of application (M1-1);

(d) Respondent's notice of motion (M1-2);

(e) Applicant's response to the respondent's notice of motion (M1-3);

(f) Applicant's written submissions (M1-4);

(g) Verbal submissions by the respondent; and

(h) Verbal submissions by the applicant.

[16] In assessing whether to summarily dismiss portions of the applicant's notice of motion, the Court reviewed all the evidence, reviewed the case law relied upon by counsel, and considered their extensive oral submissions.

[17] Although both counsel made a number of worthy submissions, this decision summarizes only the facts and arguments related to the respondent's motion to dismiss.

Positions of the Parties

Respondent

[18] In support of its motion requesting the Court summarily dismiss portions of the accused's application, the respondent argued that the accused's application improperly blends allegations of prejudice flowing from pre-charge delay together with post-charge delay in alleging a violation of section 11(*b*) of the *Charter*. In seeking an order from the

Court to summarily dismiss those paragraphs of the applicant's abuse of process argument, the respondent argued that the applicant had no reasonable prospect of success. In seeking that this Court dismiss those paragraphs of the applicant's motion, he relied upon paragraph 38 of *R. v.Cody*, 2017 SCC 31, (*Cody*) where the Supreme Court of Canada (SCC) stated:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion. [emphasis added]

[19] The respondent objected to the applicant raising specific allegations of prejudice. He argued that the *Jordan* framework was specifically designed to avoid the complexities associated with the required analysis of prejudice under the previous (*R. v. Morin*, [1992] 1 S.C.R..771), *Morin* framework and that the two concepts should not be blurred.

[20] He argued that prejudice associated with release conditions in the post-charge time frame is presumed and taken into account within the new SCC timelines as set out within *Jordan* (*R. v. Jordan*, 2016 SCC 27). He also stated that although the charges in this case were laid prior to the *Jordan* decision, both parties were mindful of the *Jordan* framework and did not rely upon the previous framework, where prejudice could be considered.

[21] The respondent addressed the specific allegations of prejudice flowing from the alleged improper exercise of discretion by the accused's commanding officer and the commanding officer's subordinates. However, after the applicant's submissions focussed primarily on the prejudice from the pre-charge delay, the respondent specifically addressed the concerns emanating from the pre-charge delay.

[22] The respondent argued that the applicant was effectively pitching three claims within his combined application. Namely, he stated that the applicant was arguing a section 11(*b*) claim, a section 7 abuse of process for the commanding officer improperly exercising his discretion, as well as an additional section 7-based claim for the seven-and-a-half-month pre-charge delay.

[23] Relying upon the cases of *R. v. Akumu*, 2017 BCSC 896 (*Akumu*), paragraph 26 and *R. v. Hunt*, 2016 NLCA 61 (*Hunt* (NLCA)), (dissent of Hoegg JA affirmed at *R. v. Hunt*, 2017 SCC 25 (*Hunt* (SCC)) paragraphs 65, 66 and 72, the respondent made it clear that any prejudice alleged from pre-charge delay is to be assessed under section 7 of the *Charter*. He relied upon paragraph 26 of *Akumu* where the court said: "Opening the

presumptive ceiling [analysis] to pre-charge time frames has a real potential to side-track s. 11(b) applications."

[24] The respondent argued that it is clear from *Hunt* (NLCA), *Akumu* (who both refer to *R. v. Kalanj*, [1989] 1 S. C. R. 1594 (*Kalanj*)) that pre-charge delay is a separate issue from 11(*b*) and that pre-charge delay and post-charge delay are not to be added together in assessing the time period lapsed. He referred to the Court Martial Appeal Court (CMAC) case of *R. v. Larocque*, 2001 CMAC 002 (*Larocque*), which implements *Kalanj* in the military context in a way consistent with *Hunt* (NLCA) and *Akumu*.

[25] The respondent further cautioned on the danger of imputing pre-charge delay into the section 11(*b*) timeline. He argued that it is clear that some cases will be more complicated to investigate than others and when the charges involve the assessment of complicated evidence, requiring proper and time consuming analysis then there may be justifiable reason for longer periods of time taken at the pre-charge level.

[26] The respondent submitted that if the applicant wishes to present an inquiry into whether there was an abuse of process, this should be entertained on its own and that the prosecution opposes the applicant merging the two applications together. He further stated that because of the differing nature of the evidence to be presented and relied upon, it is best to assess the two applications separately. He concluded by arguing that the pre-charge delay and the alleged abuse of process should be considered under section 7 as it was in *Hunt* (NLCA). *Jordan* brought a new approach to post-charge delay only. It does not address pre-charge delay, which by its own unique nature can vary extensively and as such, should be properly separated to be considered.

Applicant

[27] In his response to the respondent's notice of motion, the applicant relied upon the common law test for a motion to strike stating:

> "A claim or pleading will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v Woodhouse*, [2003] 3 S.C.R. 263, at para 15; *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959, 980; see also, *Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735. Another way of putting the test is that the claim has no reasonable prospect of success."
> (Applicant's Response to Respondent's Notice of Motion, paragraph 6)

[28] The applicant explained why he submitted a blended section 7 and section 11(*b*) application. He explained that the key challenge faced in this case is applying the *Jordan*/*Cody* regime, which was developed to address problems within the civilian criminal context, to the CAF military justice system. He argued that the Court must determine how the *Jordan*/*Cody* regime may be modified to account for those aspects of

our military justice system which are unique and do not exist in the civilian justice system.

[29] At paragraph 35 of his written submissions, the applicant argued that prior to *Jordan*, under the civilian justice system, pre-charge delay (or investigative delay) was generally not relevant to the calculation of delay. Conversely, under the military justice system, pre-charge delay has often been a factor. Relying upon the cases of *R. v. Langlois*, 2001 CMAC 3, and *R. v. Edmunds*, 2016 CM 3008, he argued that, under the Code of Service Discipline, pre-charge delay can be a factor in assessing an abuse of process and that post-*Jordan*, the issue of how to address the prejudice associated with pre-charge delay under the Code of Service Discipline has not yet been canvassed.

[30] The applicant reiterated that *Jordan* was designed to address delays in the civilian criminal justice system and emphasized that there are marked dissimilarities between the military and the civilian criminal justice systems. He stated that some of the distinctions were addressed in post-*Jordan* courts martial that considered applications under section 11(*b*) of the *Charter*. (*R. v. Thiele*, 2016 CM 4015 (*Thiele*), paragraphs 15 to 18, *R. v. Cubias-Gonzalez*, 2017 CM 2003 (*Cubias-Gonzalez*), paragraphs 66 to 77.

[31] Recognizing that two different military judges applied the presumptive ceiling of 18 months, which under *Jordan* applies to provincial courts, counsel for the applicant submitted that the previous cases were not required to address extensive pre-charge delay, as it exists in this court martial.

[32] He highlighted that under the Code of Service Discipline, there is capacity for an individual to be arrested and released under stringent custody conditions long before that individual is charged and that this could not happen in the civilian context and as such would not have been considered by the SCC in developing the *Jordan* and *Cody* framework. He stated that the military disciplinary system directly impacts the liberty and fairness to the accused in a manner that could not arise in the civilian context.

[33] The applicant argued that this Court must consider how to apply *Jordan* and *Cody* within the military justice system, while at the same time, taking into account the impact of pre-charge delays and actions taken by statutory decision-makers under Part III of *NDA* (Code of Service Discipline).

[34] He stated that while the commanding officer exercised powers in the custody review process, he was exercising powers under the Code of Service Discipline that directly impacted the accused with respect to these proceedings.

[35] In explaining the need to consider the unique attributes of our military disciplinary system in applying the *Jordan*/*Cody* framework, the applicant referred to Strayer's CJ observations in *R. v. Reddick,* (1996) CMAC-393 (*Reddick*):

> [M]ilitary justice is not treated as a serious exception to the system of fundamental justice generally guaranteed to Canadians by the Charter. Through decisions such as *Généreux* itself and through numerous legislative and administrative changes the system has been

> modified to improve the independence of members of a court martial and the conduct of trials. [. . .] the more modern judicial and legislative approach has been to bring these elements into closer harmony. This is not to say that a perfect harmony necessarily exists yet, but the emphasis should be placed on making the military justice system meet Charter standards within the special military context.
> [footnote omitted]

[36] He submitted that *Reddick* recognizes that when courts martial apply principles espoused by the SCC in the civilian criminal context, consideration and care must be given on how to successfully incorporate them into the military disciplinary system.

[37] He re-emphasized paragraph 39 of his pleadings and stated that "[u]nlike the circumstances raised in *R v Brause* (2007 CM 2007), and unlike the civilian criminal justice system, the military disciplinary system is not presently faced with limitations in institutional resources."

[38] He explained that the applicant's concerns raised with respect to section 7 are to aid this Court in applying the *Jordan*/*Cody* framework to the military context in the case at bar.

[39] The concern raised by the applicant is that we are dealing with a relatively new regime created specifically for the civilian criminal system. He argued that we are appropriately trying to apply the *Jordan/Cody* regime to the military disciplinary context as was done in the cases of *Thiele* and *Cubias-Gonzalez*, but that those two court martial cases, as helpful as they are, did not examine the full range of relevant issues that could arise with respect to delay in court martial proceedings.

[40] He stated that the SCC has said that the regimes at *R. v. Askov*, [1990] 2 S.C.R. 1199 and *Morin* no longer apply, which provides us with an indication that court martial proceedings may now need to re-examine court martial thresholds for delay as well. He urged caution in taking the civilian criminal regime and simply superimposing it on the Code of Service Discipline without consideration of the specific military context as advised by Strayer CJ.

[41] In response to the respondent's suggestion that the applications should be dealt with separately, counsel for the applicant stated that he purposely did not make an independent section 7 application and conceded that a stay is not likely warranted solely on the actions of the commanding officer of the member's unit and those officers operating under his supervision and direction.

[42] He submitted that the remedy sought is a stay of proceedings based upon a violation of section 11(*b*), and he is also looking for the Court to examine and order, as appropriate, the extent to which an abuse of process under section 7 is relevant to that determination. He emphasized that we are dealing with circumstances where the accused's rights were significantly impacted prior to any charges being laid.

[43] On 9 September 2015, the applicant was arrested but not charged, and then released subject to significant conditions. He was not charged until April 2016, over seven months later. Counsel for the applicant argued that the Court must be able to consider the specific pre-charge prejudice in some capacity, but it is a struggle as to where the pre-charge prejudice unique to the military justice system, should be considered in the context of the *Jordan*/*Cody* regime.

[44] In response to the respondent's reliance on the CMAC decision of *Larocque*, counsel for the applicant argued that *Larocque* predates *Jordan* and may no longer be applicable. He suggested that the Court must consider what the courts martial did pre-*Jordan* with respect to sections 7 and 11(*b*) applications and then adapt the application of *Jordan* and *Cody* to the military context.

[45] Counsel for the applicant agreed with the respondent that, post-*Jordan* and *Cody*, prejudice is subsumed into the thresholds set out with respect to post-charge prejudice. However, he cautioned that this concept cannot be automatically subsumed into the military context without a proper consideration of the additional outlier of prejudicial pre-charge impact.

Analysis

[46] In deciding the respondent's motion to dismiss, the central issue for this Court is to what extent prejudice suffered during pre-charge delay is a factor in assessing the constitutional timeliness of a trial under section 11(*b*).

Reasonable prospect of success

[47] In considering the respondent's motion for the Court to summarily dismiss portions of the accused's application, it is the applicant who bears the onus to advance the evidentiary foundation for his application. Although the burden on the applicant is actually quite low, it does require the applicant to present sufficient factual foundation and legal argument to show that his application has a reasonable prospect of success.

[48] In this case, in addition to his written submissions, counsel for the applicant made verbal submissions outlining the evidence he intends to rely upon. He stated that, during the application itself, he will present evidence focussed on the actions of and decisions made by the various statutory actors who affected and limited Master Corporal T.S.W.'s. interests. He foresees that much of his submissions in support of his section 11(*b*) application will be focussed on the prejudice flowing from the pre-charge delay.

[49] In assessing whether the court may summarily dismiss portions of the accused's application, the facts and grounds relied upon by the applicant in the notice (Exhibit M1-1) as well as the written (Exhibit M1-4) and verbal submissions made before the Court, must be assumed to be true.

[50] The Court's analysis focussed primarily on two questions:

(a) Can the allegations of prejudice from pre-charge delay, unique to the military justice system, be considered in a section 11(*b*) application?

(b) If the prejudice flowing from the pre-charge delay cannot be considered within the section 11(*b*) application, how can pre-charge delay, particularly in the military context, be considered?

Law

[51] Paragraph 179(1)(d) of the *NDA* provides a court martial the same powers, rights and privileges as are vested in superior courts of criminal jurisdiction with respect to matters necessary for the due exercise of its jurisdiction. As the military judge presiding at this Standing Court Martial, I have the jurisdiction to hear the accused's application and, if warranted, to provide the accused with a proper remedy under section 24(1) of the *Charter*.

[52] Likewise, I am empowered to hear the respondent's motion requesting that I dismiss those portions of the applicant's section 7 abuse of process application.

[53] As a Court, empowered with the same powers, rights and privileges vested in superior courts of criminal jurisdiction with respect to matters necessary for the due exercise of its jurisdiction, I must also instruct myself on the law as it relates to superior courts of criminal jurisdiction.

[54] In *Jordan*, the SCC identified a culture of complacency towards delay in the criminal justice system. Applying the SCC's guidance, an efficient military justice system is of utmost importance and the ability for the CAF to provide fair trials within a reasonable time is "an indicator of the health and proper functioning of the system itself." In its attempt to address delay, the SCC imposed upon all players, a framework intended to focus the section 11(*b*) analysis on the issues that matter and to encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice. The new framework is applicable to any case that was in the criminal justice system when *Jordan* was released. Consequently, this court martial must apply the new framework, with its transitional features, as far as they apply to the case at bar.

[55] Section 11(*b*) of the *Charter* addresses the right of those persons who have been charged with an offence the right to be tried within a reasonable time.

> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*b*) to be tried within a reasonable time;
> [my emphasis]

Can pre-charge delay, unique to the military justice system be considered in a section 11(b) application?

[56] Defence counsel vigorously argued that the *Jordan* decision focusses only on addressing problems within the civilian criminal justice system where pre-charge restrictions unique to the military simply do not exist. Relying upon the comments of Strayer CJ in the CMAC decision of *Reddick*, he argued, "emphasis should be placed on making the military justice system meet Charter standards within the special military context."

[57] Prior to the SCC's decision in *Jordan*, in determining whether this post-charge delay was reasonable, the court, in certain circumstances, could consider pre-charge delay. However, such consideration did not involve adding pre-charge delay to the post-charge delay. Rather, the court would consider whether the time that had elapsed, before the charge, adversely impacted the fairness of the trial or the right of the accused to make full answer and defence. This approach was considered in the context of the military justice system by the CMAC where it considered the pre-charge delay when it assessed the infringement of the accused's rights, under section 7 of the *Charter* (see *Larocque*, reasons of Létourneau JA, paragraphs 4 and 5); See also (*R. v. Finn*, [1997] 1 S.C.R. 10; and reasons of Marshall JA of the Newfoundland Court of Appeal in *R. v. Finn* (1996), 106 CCC (3d) 43, at paragraphs 60, 61 and 62).

[58] Although the SCC's decisions of *Jordan* and *Cody* changed the legal landscape by setting presumptive ceilings for delay, there is no reason to believe that the pre-*Jordan* exception for considering pre-charge delay under section 7 of the *Charter* did not survive. Notwithstanding this, the applicant has not presented any evidence to suggest that his right to make full answer and defence was compromised at all, making the application of this exception moot.

[59] It is also important to note that the section 11(*b*) *Charter* provision is drafted to apply to persons charged and, by virtue of its construction, pre-charge delay is not afforded protection in the narrow section 11(*b*) right.

[60] The *Charte*r and law based on it, as set out by the SCC, is binding on this Court, and although there is latitude for the Court to adapt its procedures to the meet the unique needs of the military, specific consideration of pre-charge delay, unique to the military justice system, cannot simply be imported within the post-charge *Jordan* timeline.

[61] As the respondent clearly argued in his submissions, it is almost impossible to provide a prescriptive time limit to measure prejudice flowing from pre-charge delay. In fact, there are cases that are exceptionally complex and require extensive expertise and time to properly assess, while on the other hand there are cases which are very clear and straightforward. In essence, every case will turn on its own facts.

[62] Referring to the comments of Lamer J in *Mills v. The Queen*, [1986] 1 SCR 863, page 94, and reiterated in *R. v. L. (W.K.)*, [1991] 1 S. C.R. 1091 at 1100. "[I]t is not the

length of the delay which matters but rather the effect of that delay upon the fairness of the trial. [emphasis added.]"

[63] This principle was clarified most recently in the 2017 case of *R. v. Hunt* (SCC), affirming the dissenting reasons in the Court of Appeal decision. Although the SCC found that Crown misconduct could be a reason to stay the charges, the mere length of the investigation would not. The court recognized that it would be improper to reward more sophisticated criminal conduct or allegations that require more detailed forensic assessments to be completed.

[64] Based on the evidence presented by the applicant, this Court has not been provided with a path for admissibility or any other legal authority whereby the applicant's pre-charge delay can be rolled into the section 11(*b*) timeline under the *Jordan* framework.

[65] The Court accepts the applicant's submissions that due to the exceptional pre-charge sanction power available within the military justice system, there should be a mechanism whereby its prejudice may be considered. However, importing the pre-charge delay and prejudice into the post-charge timeline in assessing whether the applicant's rights were infringed under section 11(*b*) is not the route.

If pre-charge delay cannot be considered within section 11(b), how can pre-charge delay, in the military context, be considered?

[66] Although, this Court is not of the belief that a section 7 or abuse of process argument flowing from a pre-charge delay may be imported into the section 11(*b*) *Jordan* application, the reverse is not true.

[67] In fact, there is no legal impediment to admitting evidence considered in a *Jordan* application, in context with the evidence considered in a section 7 application. In other words, although there appears to be no authority to consider section 7 rights within the current section 11(*b*) *Jordan* framework, there appears to be no barrier to blending section 11(*b*) evidence into a section 7 argument in order to protect the fairness of the trial.

Section 7

[68] Section 7 of the *Charter* reads as follows:

> 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.

[69] In effect, based on the cases relied upon by counsel, there is legal precedent, where pre-charge delay in the military context was considered under section 7 of the *Charter*, when the rights of the accused were breached contrary to the principles of fundamental justice. As Létourneau JA points out in the CMAC decision of *Larocque*, a

three-step analysis exists in determining whether an accused's right under section 7 of the *Charter* has been breached:

> [TRANSLATION]
>
> [10] Section 7 of the Charter is breached when the right to liberty and security of the person has been infringed and this infringement occurred in violation of the principles of fundamental justice. The analysis is a three-step one: determining whether there was a deprivation of this right, identifying and defining the principles of fundamental justice at issue and determining whether the deprivation has occurred in accordance with these principles: *R. v. White*, [1999] 2 S.C.R. 417, at page 438.

[70] Within the military justice system, Létourneau JA in *Larocque*, at paragraph 17 described the principle of fundamental justice, in a manner which is highly relevant to the case at bar:

> [TRANSLATION]
>
> [A] person who is arrested without a warrant because the authorities have reasonable grounds to believe he has committed an offence, whether that person is detained or released, shall be charged as soon as materially possible and without unreasonable delay unless, in the exercise of their discretion, the authorities decide not to prosecute.

[71] It follows that pre-charge delay in the military justice system is a factor in considering whether there has been a breakdown in a principle of fundamental justice under s.7 of the *Charter*.

Abuse of Process

[72] As counsel both independently highlighted, abuse of process can fall within two categories:

(a) cases where the state conduct compromises the fairness of an accused's trial (main category); and

(b) cases where the state conduct creates no threat to the fairness but risks undermining the integrity of the judicial process (the "residual category")
R. v. Babos, 2014 SCC 16, paragraph 31.
And Hoegg JA in *Hunt* (NLCA) recognizing *O'Connor*.

[73] In their respective submissions, both the applicant and the respondent independently admitted that the facts of the case at bar, if proved, would fit within the "residual category" of abuse of process.

[74] In essence, the combined effect of all delay, both pre and post-charge, as well as "state conduct" which in this case involves the conduct of the prosecution and chain of command as key decision-makers could be assessed in the "residual category" as described by L'Heureux-Dubé J in *R. v. O'Connor,* [1995] 4 SCR 411 (*O'Connor*), paragraph 73 at 463:

> [T]he panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a matter as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[75] Indeed, the SCC earlier posited in *R. v. L.(W.K.)*, [1991] 1 S. C. R. 1091, at 1100:

> Section 7 and s. 11(*d*) of the *Charter* protect, among other things, an individual's right to a fair trial. The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear. The comments of Lamer J., as he then was, in *Mills v. The Queen*, *supra*, at p. 945, are apposite:
>
> > Pre-charge delay is relevant under ss. 7 and 11(*d*) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial.
>
> Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.
> [emphasis in original]

[76] As referred to by the applicant in his written submissions, in the case of *Hunt* (NLCA), Hoegg JA acknowledged that the SCC (recognized in *R. v. Jewitt,* [1985] 2 S.C.R. 128) accepted that a trial judge has discretion to stay proceedings for abuse of process where compelling an accused to stand trial would violate the fundamental principles of justice that underlie the community's sense of fair play and decency through oppressive or vexatious proceedings.

[77] Based on the facts presented by the applicant, without having to go through the three-step test set out above (*R. v. White*, [1999] 2 S.C.R. 417, at page 438, as relied upon by Létourneau JA in *Larocque*) to determine whether the accused's section 7 rights were breached contrary to the principles of fundamental justice, the Court finds that the applicant has submitted some evidence, where presumed to be true, meets the threshold of a reasonable prospect of success in a section 7 application.

[78] Although the applicant has a reasonable prospect of success in proving a violation of his section 7 rights, counsel for the applicant conceded at paragraph 82 of his written submissions (Exhibit M1-4) that the alleged abuse of process, alone, may not be sufficient to justify a stay of proceedings. The Court has not been presented with sufficient evidence to determine whether or not this is in fact true. Nonetheless, the Court is prepared to hear a section 7 application later in these proceedings.

Relief

[79] In short, the respondent's motion to dismiss is granted as follows:

(a) the section 11(*b*) *Jordan* application will proceed first, independent of the applicant's abuse of process and breach of section 7 allegations as set out in paragraphs 21 to 28 of the applicant's notice;

(b) if a stay is not granted from the *Jordan* application, then the evidence of delay flowing from the *Jordan* application, as well as any other prejudicial evidence flowing from pre-charge delay, unwarranted searches or other inappropriate conduct of any of the key state actors may be blended into the applicant's section 7 application and addressed together at that time; and

(c) the Court is mindful of additional notices of applications filed by the accused, so final arguments and a decision on a section 7 application may be more appropriately argued after the Court has heard all the evidence in the proceedings. Even if the applicant chooses to provide submissions earlier in the proceedings, the Court may reserve its decision until either the close of the prosecution's case or prior to the delivery of any findings.

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The Director of Military Prosecutions as represented by Major C. Walsh and D.G.J. Martin, Counsel for Her Majesty the Queen (Respondent)