COURT MARTIAL

Citation: *R. v. Iredale*, 2020 CM 4009

Date: 20200716
Docket: 201970

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

Prosecutor
and
Moving Party

- and -

Captain M.J. Iredale

Accused
and
Respondent

Motion heard in Victoria, British Columbia on 23 June 2020
Reasons delivered in Gatineau, Quebec on 16 July 2020

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by General Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "D.R.", shall not be published in any document or broadcast or transmitted in any way.

FINDING ON A MOTION FOR SUMMARY DISMISSAL OF A DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS

Introduction

[1] Six charges have been preferred against Captain Iredale on 17 December 2019, alleging offences of sexual assault on three occasions and conduct to the prejudice of good order and discipline on three other occasions. On 12 February 2020, Lieutenant-Colonel Berntsen, counsel for the accused, filed a notice of application seeking a stay of proceedings on the basis of alleged violations of Captain Iredale's rights under section 7 of the *Canadian Charter of Rights and Freedoms*, notice which was subsequently amended and filed on 4 May 2020 (Exhibit M1-6). The prosecution responded by filing a notice of motion to dismiss on 25 May 2020, which it also amended and filed on 22 June 2020 (Exhibit M1-8).

[2] The court martial commenced its proceedings at Canadian Forces Base (CFB) Esquimalt on 22 June 2020 and the prosecution's motion to dismiss was heard in the afternoon of 23 June 2020, following hearing and determination pertaining to two applications filed by the defence.

Position of the parties

[3] The applicant prosecution submits essentially that there is no basis upon which the application by the defence could succeed. Therefore, it is submitted that I should exercise my trial management powers to dismiss that application summarily instead of wasting court time in a hearing that is doomed to fail.

[4] For the defence, Lieutenant-Colonel Berntsen reminds the Court that he is only at the stage of a notice of application and that, as such, it is premature to require him to present a complete factual picture. He submits that the allegations made have an air of reality to them and that the facts that will come out from the witnesses that he intends to call in the course of the hearing of the application will show its merit. He adds that some of the facts are known to the prosecution just as well as to the defence given that they were included in the disclosure. As for the law, counsel for the defence did not have anything to add to what is in the notice of application, choosing not to specifically reply to the contrary position in law taken by his opponent.

Issue

[5] The broad issue to be determined at this stage is whether, in the exercise of my duty to manage these proceedings, I should proceed with hearing the defence application. This requires me to assess whether the grounds advanced by the defence have a reasonable prospect of success, otherwise the defence's application should be summarily dismissed without a full evidentiary hearing.

[6] I am of the view that the defence has not offered the Court any facts or law which could lead me to conclude that its application has any chance of success on any of the grounds alleged. Consequently, the application cannot possibly result in the Court granting a stay of proceedings

as requested. Thus, I must grant the prosecution's application and summarily dismiss the defence's application. I will now explain why.

Analysis

The grounds alleged in the defence application for a stay of proceedings

[7] The grounds for the defence application are enumerated at paragraphs 2 to 8 of the amended notice of application. Besides the first two paragraphs asserting that section 7 of the *Charter* is at play in this trial, which is not denied, and the last paragraph, to the effect that the appropriate remedy in this case is a stay of proceedings pursuant to section 24 of the *Charter*, the application seeks the following four main findings:

> (a) A finding that the following are principles of fundamental justice:
>
> i. That once the investigative file has sufficient elements to establish an offence, the member should be charged; and
>
> ii. That in the military community, it is imperative that justice be promptly rendered.
>
> (b) A finding that the above listed principles of fundamental justice were violated in the facts of this case.
>
> (c) A finding that Captain Iredale suffered prejudice that renders the trial unfair as a result of the violations of principles of fundamental justice in the facts of this case.
>
> (d) A finding that the conduct of the chain of command, military police and the Director of Military Prosecutions in this case undermines the integrity of the military justice system and brings it into disrepute.

[8] The applicant then lists in thirty-eight sub-paragraphs what he characterizes as "Background Facts" which he expects to establish in his application. Some of these contain opinions and bare allegations, amongst them:

> "h. As of 25 January 2018, the Canadian Forces National Investigation Service (CFNIS) had sufficient elements to an offence to charge Captain Iredale.
>
> . . .
>
> ii. Some of the investigative material which should have been entered into CFNIS evidence was not entered.

jj. Some of the potential witnesses in this case no longer remember the incidents and cannot distinguish between what they knew at the time and what they know now, nor can they distinguish the source of the information they know now.

kk. Captain Iredale suffered prejudice as claimed in his application."

The power of the military judge to manage proceedings

[9] Paragraph 179(1)(d) of the *National Defence Act* (*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 General Court Martial, I have the jurisdiction to hear and determine the application as a question of mixed law and fact. I consequently have the jurisdiction to assess whether it should be summarily dismissed.

[10] In submitting that the Court should summarily dismiss the application, the prosecution argued that the applicant had no reasonable prospect of success, relying on paragraph 38 of *R. v. Cody*, 2017 SCC 31, 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.

[11] What has become known as the *Cody* test – "reasonable prospect of success" and "no basis upon which the application could succeed" – emerges from earlier case law and it has now been applied in some subsequent cases. The two original cases referred to in *Cody*, namely, *Kutynec* and *Vukelich* were decided in 1992 and 1996 respectively. They described the "no basis" test in similar terms. The issue before me is whether the grounds advanced by the defence have a "reasonable prospect" of meeting the applicable legal test or tests, including for abuse of process, or whether they disclose "no basis" for satisfying these tests and should therefore be summarily dismissed without a full evidentiary hearing.

[12] A more recent decision by Code J. of the Ontario Superior Court of Justice in the case of *R. v. Walton*, 2019 ONSC 928 described the test in words which are worth quoting at length as they are especially relevant in the context of whether an application alleging inappropriate actions by actors in the justice system should be summarily dismissed :

> [48] In two decisions released shortly after *Kutynec*, the Ontario Court of Appeal fleshed out what was meant by terms such as "no basis", "evidentiary basis", "the facts as alleged", and "offer of proof". In *R. v. Durette et al* (1992), 72 C.C.C. (3d) 421 at 436-440 (Ont. C.A.), the same panel

that decided *Kutynec* stated the following, in upholding a trial judge's ruling denying an evidentiary hearing on a *Charter* motion:

> … to allow an evidentiary hearing for that purpose, there must be some basis for suspecting the Crown's choice of conduct. In order to ask the court to delve into the circumstances surrounding the exercise of the Crown's discretion, or to inquire into the motivation of the Crown officers responsible for advising the Attorney- General, the accused bears the burden of making a tenable allegation of *mala fides* on the part of the Crown. Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation, the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly and not for improper or arbitrary motives
> …
> It must follow from La Forest J.'s statement [in *Beare*] that the allegation of improper or arbitrary motives cannot be an irresponsible allegation made solely for the purpose of initiating a "fishing expedition" in the hope that something of value will accrue to the defence.
>
> …
>
> The mere fact that the Crown made a decision does not, without more, form a basis for an allegation of bad faith. Nor does it require a trial judge to allow an evidentiary hearing to inquire into why the discretion was not exercised differently. [Emphasis in original.]

[49] The distinction in *Durette* between "a tenable allegation" and "an irresponsible allegation" was applied by Dambrot J. in *Perks v. A-G Ontario* [1998] O.J. No. 421 at para. 9 (S.C.J.), in denying an evidentiary hearing in relation to an allegation of abuse of process. He reasoned as follows:

> In this case, the Crown articulated a perfectly reasonable explanation for his decision to intervene, and to withdraw the information. Thus the record disclosed no basis to embark on an evidentiary hearing. [Counsel's] allegation that the Ministry of the Environment and big business are in "an unholy alliance ... whose object is to rape the environment", however colourful, is nothing more than an allegation. It neither changes the state of the record nor amounts to an offer of proof. [Emphasis in original.]

On further appeal, the Court of Appeal expressly agreed with the above reasoning and dismissed the appeal. See: *Perks v. A.-G. Ontario*, [1998] O.J. No. 5266 (C.A.). Also see *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 at paras. 76-82 and 85 (Ont. C.A.).

[50] The *Kutynec* issue, concerning "the accused's right to an evidentiary hearing" in support of a *Charter* motion or abuse of process application, finally reached the Supreme Court in three important cases decided between 2005 and 2014. In the first case, *R. v. Pires and Lising* (2005), 201 C.C.C. (3d) 449 at paras. 24 and 34-5 (S.C.C.), Charron J. gave the unanimous judgement of the Court and upheld the trial judge's denial of an evidentiary hearing on a s.8 *Charter* motion. After quoting from the Ontario Court of Appeal's decision in *Durette*, she stated:

> …the accused's right to an evidentiary hearing must be considered in context. It must also be balanced against countervailing interests, including the need to ensure that the criminal trial process is not plagued by lengthy proceedings that do not assist in the determination of the relevant issues
>
> …judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court. [Emphasis in original.]

In the second case, *R. v. Nixon* (2011), 271 C.C.C. (3d) 36 at paras. 60-2 (S.C.C.), Charron J. again gave the unanimous judgement of the Court. She applied the reasoning in *Pires* to an abuse of process Application and held that there must be a "proper evidentiary foundation" before embarking on "an inquiry into the reasons behind an act of prosecutorial discretion":

> ... mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new. *R. v. Pires*, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* at (para. 35):
>
> > For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the ·issues before the court.
>
> Quite apart from any such pragmatic considerations, there is a good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. [Emphasis in original.]

Finally, in *R. v. Anderson* (2014), 311 C.C.C. (3d) 1 at para. 52-5 (S.C.C.), the Court quoted the above passage from *Nixon* and stated the following (per Moldaver J. on behalf of a unanimous Court):

> Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith. *Application under s. 83.28 of the Criminal Code (Re)*, [2004], 2 S.C.R. 248 at para. 95. It also accords with this Court's statement in *Sriskandarajah*, at para. 27, that "prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives". [Emphasis of Moldaver J. in the original.]

[51] The most useful post-*Cody* decision, in my view, is *R. v. Papasotiriou-Lanteigne*, 2017 ONSC 5337. In that case, the accused brought a motion seeking to remove Crown counsel on the basis of numerous allegations of serious Crown and police misconduct, all set out in lengthy affidavits sworn by the accused. The Crown brought a responding motion seeking to summarily dismiss the defence motion without an evidentiary hearing. Nordheimer J., as he then was, granted the Crown's motion. After quoting the passages from *Cody* and *Kutynec*, already set out above, he reasoned as follows (at paras. 10, 17, 22, 25 and 26):

> … as will be apparent from a review of Mr. Ivezic's affidavit, it is replete with suspicion, conjecture, and speculation. Mr. Ivezic [one of the two accused] is, of course, entitled to be suspicious of the actions of the police who investigated him. However, his suspicion cannot be a substitute for evidence and facts. …Mr. Ivezic's complaints about the conduct of Crown counsel (and of the police) are drawn from his opinions and beliefs that are, in turn, based almost entirely on conjecture and speculation. None of that amounts to evidence.
>
> …
>
> Rather, what is envisaged [pursuant to *Cody* and *Kutynec*] is that counsel will advise the court of their "best case", assuming that there is a reasonable prospect that they could obtain all of the facts that they hope to through an evidentiary hearing, and the court will then determine if that best case could reasonably achieve the result that the party seeks.
>
> …

> Under the process I have described, I am entitled to look at what counsel for the applicant says the evidence currently reveals, and at what counsel for the respondents asserts the evidence might become, and determine whether it would warrant this court granting an order removing Crown counsel from this prosecution… Having set out the test, I will say that the bare allegations made by the respondents regarding the conduct of Crown counsel… might suggest that a removal order could be obtained.
>
> However, the allegations are just that – allegations. The evidence in support of those allegations is difficult to find. It is clear that the respondents do not trust Crown counsel, to put it mildly. They have their reasons for their attitudes in this respect and they are entitled to hold those attitudes. However, attitudes, opinions, and beliefs are not evidence. It would not be surprising that an accused person would not necessarily trust prosecuting counsel. The question is whether there is an evidentiary foundation from which the court could draw the conclusion that the conduct of Crown counsel has crossed over the line such that their removal could be justified. [Emphasis in original.]

Also see: *R. v. Frederickson*, 2018 BCCA 2 at paras. 24-6; *R. v. Blanchard*, 2018 ABQB 43 at paras. 12-17.

[52] The propositions that I draw from the above review of the *Kutynec* and *Cody* line of authority are as follows:

- the "anticipated evidentiary basis" for a *Charter* or abuse of process Application refers to "the facts as alleged by the defence" or "the facts upon which it relies" (*Kutynec* and *Vukelich*);
- an "irresponsible allegation made solely for the purpose of initiating a fishing expedition" or "a bare allegation of abuse of process" does not displace "the presumption that prosecutorial discretion is exercised in good faith" (*Durette, Nixon,* and *Anderson*);
- a "colourful… allegation" made by counsel in argument or "conjecture and speculation" in an affidavit do not amount to "an offer of proof" or "evidence" or "an evidentiary foundation" (*Perks* and *Papasotiriou-Lanteigne*);
- a "reasonable likelihood that the [evidentiary] hearing can assist" and a "reasonable prospect of success" appear to be analogous standards that have both been applied by the Supreme Court (*Pires, Nixon, Anderson,* and *Cody*).

[13] Applying the above principles to the findings requested I will now analyze the four substantive grounds alleged by the defence in support of its request for a stay of proceedings.

The proposed principles of fundamental justice

[14] In support of the defence submission to the effect that "once the investigative file has sufficient elements to establish an offence, a subject of an investigation should be charged" is a principle of fundamental justice, counsel for the defence cites the decision of *R v. Larocque,* 2001 CMAC 2 as a sole source of law. As for the facts, the defence submits that the military police had sufficient elements to establish an offence and lay a charge as of 25 January 2018 but did so only on 21 May 2019, alleging that there will be no evidence that justifies or explains that delay.

[15] The submission to the effect that "in the military community, it is imperative that justice be promptly rendered" the defence submits as source of law the decision of *R. v. Perrier* (2000), CMAC-434. As for the facts in support of that proposition, counsel for the defence submits there have been periods of time since the complaint was made when the chain of command, the military police, the Director of Military Prosecutions and the Assistant Judge-Advocate General took or failed to take actions that caused direct delay to the rendering of justice.

[16] As far as the law is concerned, the decisions of *Larocque* and *Perrier* are significantly different than the situation that we have in this case as both of the accused in these cases had suffered significant restrictions to their liberty interests and their security early in the investigative process which continued for significant periods of time until their trial.

[17] Master-Corporal Larocque was a military policeman arrested without a warrant in October 1998 for criminal harassment. He was initially charged over a year later in November 1999. His trial commenced in September 2000. As a consequence of his arrest, he had been detained until released the next day under strict conditions involving restrictions on his freedom of movement. He was also subject to caution and observation measures and he had lost his accreditation as a police officer. The Court commented on the insecurity that resulted from the arrest, loss of status and the assignment to reduced duties, and the uncertainty as to the procedures that were so slow to unfold.

[18] On the basis of provisions of the *Criminal Code* applicable to a person arrested without warrant, Létourneau J.A. for an unanimous bench of the Court Martial Appeal Court (CMAC) recognized the following principle of fundamental justice: "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." The Court found that this principle had been violated but refused to order a stay of proceedings, finding instead that the reduction in sentence applied by the military judge was an adequate remedy for the breach of Master-Corporal Larocque's rights in that case.

[19] The situation in *Larocque* was entirely different than what occurred in this as Captain Iredale was never arrested. Hence he was not subject to release conditions restraining his liberty interests. As a part-time member of the reserve force in the Cadet Organizations Administration and Training Services, he would not likely suffer the same kind of administrative consequences as those imposed on a full-time member of the military police. Assuming that *Larocque* recognized a principle of fundamental justice that remains valid today, it remains that this principle cannot apply to the situation in which Captain Iredale found himself in this case.

[20] For his part, Master Warrant Officer Perrier was a member of considerable rank and responsibilities. In the days following the commencement of a military police investigation into the disappearance of public funds in July 1997 he confessed in writing. He was suspended from his military duties without pay, had to turn in his equipment and undergo a "clearance" procedure. The police investigation was concluded in January 1998 and charges laid on 22 June 1999. The trial started in January 2000, over two and a half years after the confession. Writing for a unanimous bench of the CMAC, Desjardins J.A. found that the military judge was correct

in finding that the liberty interests of Master Warrant Officer Perrier were infringed by the requirement that he notifies the military authorities of his outings if they were for longer than two hours and that he had not erred in finding that a principle of fundamental justice existed to the effect that "in the military community it is imperative that justice be promptly rendered". The stay of proceedings ordered at trial was consequently upheld on appeal.

[21] Once again, the situation of Captain Iredale is completely different than the predicament imposed on Master Warrant Officer Perrier who essentially lost his sole source of income as a result of the actions of military authorities.

[22] In any event, *Perrier* and *Larocque* were the first two cases in what has been described by the prosecution as a trilogy of CMAC decisions that considered pre-charge delay in a relatively short period of time in 200-2001. In the last and most recent of these cases, *R. v. Langlois*, 2001 CMAC 3, the CMAC considered its previous decisions in *Perrier* and *Larocque*, toning down considerably their impact as the Court stepped away from the methodology adopted in these two previous cases as it pertains to the recognition of principles of fundamental justice. Writing for a unanimous bench, Décary J.A. commented on *Larocque* and *Perrier* as follows:

> [16] In *Perrier*, it is true that this Court, at para. 44 of its reasons, referred to the "principle of fundamental justice that requires speedy justice", but in my view this was in the context of an abuse of process. It should be borne in mind that in *Perrier* the accused made a confession on August 7, 1997, was suspended without pay on August 13, 1997 and the indictment was not laid until June 22, 1999. In my opinion, *Perrier* only established as a principle of fundamental justice that there is a duty to act expeditiously in charging a person who admits having committed the crime.
>
> [17] In *Larocque*, I note that at para. 17 Létourneau J.A. identified the principle of fundamental justice more clearly than the Court did in *Perrier*. In his view, the principle in the circumstances was the following:
>
> > [TRANSLATION]
> >
> > . . . person arrested without a warrant because the authorities have reasonable grounds to believe he or she has committed an offence, whether detained or discharged, must be charged as soon as it is physically possible and without unnecessary delay, unless in the exercise of their discretion the authorities decide not to prosecute.
>
> [18] The conclusion has to be, in my view, that the pre-charge delay is a factor that has an influence in identifying a principle of fundamental justice, but that factor does not by itself imply a breach of fundamental justice. The pre-charge delay should rather be taken together with other factors, the combined effect of which places the government's conduct in the "residual category" described by L'Heureux-Dubé J. in O'Connor (supra, para. 12) at 463:
>
> > . . . the panoply of diverse and sometimes unforseeable 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.
>
> [19] It would not seem desirable to treat as a principle of fundamental justice a duty to act expeditiously that imposes time constraints on any inquiry, further inquiry or reopened inquiry regardless of the circumstances. The comments of Stevenson J. in *R. v. L.* (W.K.), [1991] 1 S.C.R. 1091, seem greatly relevant here:

> Many of the cases which have considered the issue have held that "mere delay" or "delay in itself" will never result in the denial of an individual's rights. This language is imprecise. Delay can, clearly, be the sole "wrong" upon which an individual rests the claim that his or her rights have been denied. The question is whether an accused can rely solely on the passage of time which is apparent on the face of the indictment as establishing a violation of s. 7 or s. 11(d).
>
> Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, Laskin C.J. (with whom the majority agreed on this point) stated that (at pp. 1040-1041):
>
> > Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by courts by fitting investigations into a standard mould or moulds. …
> >
> > Does the Charter now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not. Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in *Rourke* are equally applicable under the Charter.

[23] The reasons in *Langlois* to the effect that is was not desirable to treat as a principle of fundamental justice a duty to act expeditiously were subsequently strengthened by the Supreme Court's jurisprudence defining more precisely what constitutes principles of fundamental justice, starting in 2003 with the decision of *R. v. Malmo-Levine,* [2003] 3 S.C.R. 571. As a result, it may well be that the principles of fundamental justice discussed in *Larocque* and *Perrier* relied on by the defence in this case probably do not exist anymore or, if they do, certainly do not apply to the situation of Captain Iredale on the facts.

[24] I also believe that these or similar principles could not and cannot be recognized as new principles of fundamental justice as they do not have the characteristics required by the Supreme Court of Canada in the majority reasons by Cromwell J. at paragraph 91 of *Canada (Attorney General) v. Federation of Law Societies of Canada,* 2015 SCC 7, probably the most recent case in the lineage that commenced in 2003 with *Malmo-Levine*. Indeed, principles of fundamental justice must be legal principles, there must be "significant societal consensus" that they are "fundamental to the way in which the legal system ought fairly to operate" and they must be sufficiently precise so as "to yield a manageable standard against which to measure deprivations of life, liberty or security of the person". Assuming the principles outlined are legal principles, they certainly do not meet the two other criteria to be recognized as principles of fundamental justice.

[25] This is particularly true for the proposed principle of fundamental justice to the effect that "once the investigative file has sufficient elements to establish an offence, a subject of an investigation should be charged". In this case, this would mean that the accused should have

been charged as soon as the police had obtained the version of the complainant on 25 January 2018. Recognizing this principle would not only be contrary to the pre-charge screening requirements identified in the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), it would also mean that there would be a requirement to charge a person solely on the basis of allegations of one complainant, without verification of any sort and without even offering the opportunity to the subject of the investigation to provide his or her side of the story. I fail to see how such a proposition promotes fundamental justice, let alone the rights of accused persons.

[26] The principle of fundamental justice approach proposed by counsel for the defence appears to be a means by which I am invited to find that by delay or passage of time alone a violation needs to be found in the absence of justification. This seems to be what is submitted in the following paragraph from the defence submissions:

> "33. The applicant expects that there will be no evidence to justify the actions that caused direct delay such that an inference that the actions which caused direct delay were intended to cause delay could and should be made."

[27] These words, as difficult to understand as they are, reveal an attempt at reversing the burden of proof to suggest that passage of time alone would allow the court to presume some of *mala fides* on the part of the prosecution, which would then have to be justified. That is not the law. From the facts offered in the application, I am invited to infer that the file could have progressed faster but no facts point to any inappropriate actions from prosecutorial authorities that would have caused excessive delay. Referring from the lengthy quote from *Walton* above, I am confronted with what I must qualify as irresponsible allegations made solely for the purpose of initiating a fishing expedition and bare allegation of abuse of process which do not displace the presumption that prosecutorial discretion is exercised in good faith.

[28] Although the length of pre-charge delay is a factor in considering whether there has been a violation of the rights of an accused person under section 7 of the *Charter*, it is not the length of the delay which matters, but rather the effect of that delay upon the fairness of the trial (*R. v. W.(T.S.)*, 2017 CM 2012 at paragraphs 62-63; *R. v. Hunt*, 2016 NLCA 61 at para 67 (affirmed in *R. v. Hunt*, 2017 SCC 25). I do acknowledge that the investigative delay was lengthy but the application offers no evidence or indication that it is of sufficient magnitude so as to result in a deprivation of the security of the accused's person.

[29] It is alleged that Captain Iredale suffered prejudice but very little is offered as to what prejudice exactly and how it materialized. The defence is offering to prove that Captain Iredale was prejudiced by his inability to continue working within the Canadian Forces and by the psychological impacts of being contacted on Christmas Day to arrange service of documents and being advised that he had been released from the Canadian Forces when he had not. Yet, Captain Iredale was the commanding officer of a cadet unit at the time of the complaint. Absent any details as to how this alleged prejudice materialized, it is impossible for me, or I believe anyone, to conclude that such events are anything more than annoyances that are not in any way susceptible to engage security interests under section 7 of the *Charter*. Indeed, an officer in the position of Captain Iredale would understand that in light of the allegations formulated against

him he would need to be isolated from staff and young persons. He would also be familiar with regulations pertaining to the requirements of the disciplinary process and the fact that an officer cannot be released from the service without formal notice.

[30] I do not deny that Captain Iredale may well have experienced stigma and other similar inconveniences in the course of the investigation and since having been charged. However, this is a situation similar as the one described in *R. v. Spriggs*, 2019 CM 4002 at paragraph 44 as the evidence offered does not reveal any prejudice that would seem excessive in comparison to any other person suspected and charged for a similar offence in relation to a workplace.

[31] As it pertains to the allegations of the defence pertaining to delay in the context of principles of fundamental justice, I must conclude that no anticipated evidentiary basis or facts have been offered on which these allegations could result in a finding that the section 7 rights of Captain Iredale were infringed.

The abuse of process

[32] The defence's allegation go beyond principles of fundamental justice. In alleging prejudice that renders the trial unfair and would be aggravated and continued by the proceedings against him as well as a finding that the conduct of the chain of command, CFNIS and the Director of Military Prosecutions in this case undermines the integrity of the military justice system and brings it into disrepute, the defence is essentially alleging abuse of process under both the main and residual categories.

[33] The modern law pertaining to abuse of process has been summarized by Moldaver J. for the majority of the Supreme Court of Canada in *R. v. Babos*, 2014 SCC 16 at paragraphs 30 to 35 in these words:

> [30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
>
> [31] Nonetheless, this Court has recognized that there are rare occasions —the "clearest of cases" — when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
>
> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and

> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).
>
> [33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the "main" or "residual" category is invoked.
>
> [34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.
>
> [35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
> [Emphasis in original.]

[34] It is the above test for abuse of process that must be applied in relation to the current prosecution's application to summarily dismiss, the issue before me being whether the basis or grounds advanced by the defence have a "reasonable prospect" of meeting the *Babos* test for abuse of process, or whether they disclose "no basis" for satisfying that test and should therefore be summarily dismissed without a full evidentiary hearing.

[35] The generality of the allegations by the defence become more precise when considering the following allegations found in the amended notice of application. As it pertains to the main category, it is submitted that the following complaints will render the trial unfair:

(a) That due to the passage of time potential witnesses "no longer remember the incidents and cannot distinguish between what they knew at the time and what they know now, nor can they distinguish the source of the information they know now."
(Notice of Application, paragraphs 10(jj) and 34)

(b) That due to the passage of time members of the panel may have difficulties understanding why a complaint first made in December 2017 was not heard until 2020, with potential prejudice to either parties.
(Notice of Application, paragraphs 35 and 36)

(c) That "some of the investigative material which should have been entered into CFNIS evidence was not entered and is now not retrievable." (Notice of Application, paragraphs 10(ii) and 34)

[36] The first and second grounds alleging that the trial would be rendered unfair are too general to be in any way relatable to the specific circumstances of this case and are in many ways speculative. Of course, witnesses' memories may be affected by the passage of time as by other factors. This is true in a great number of cases and impacts both parties. Yet such a general statement is insufficient to ground a conclusion to the effect that fairness of the trial would be negatively affected. As for the negative impact of time on the attitude of the members of the panel, I disagree with the statement implying that somehow members of the panel would not perform their duties with the expected rigour by virtue of the passage of time. Respectfully, this speculative assertion has no merit. I have to conclude that no anticipated evidentiary basis or facts have been alleged under the first category on which these complaints could possibly amount to an abuse of process.

[37] The general allegation pertaining to investigative material not entered into evidence also suffers from significant deficiencies. The law pertaining to the consequences on the *Charter* rights of an accused of a failure of investigative and prosecutorial authorities to safeguard investigative material in its possession has been defined in detail by the Supreme Court of Canada in *R. v. La,* [1997] 2 SCR 680. QR&O article 112.04 requires that notice be given of applications in sufficient detail to allow an understanding of the nature of the application or objection. The mention in the defence application of "investigative material which should have been entered into CFNIS evidence" without further details is entirely insufficient to allow the Court to assess what this material is; whether it constitutes relevant investigative material that triggered an obligation to safeguard and explain its loss or destruction; and whether the loss was the result of unacceptable negligence. Without any of these details it is entirely impossible to assess what remedy is acceptable in the circumstances, especially whether a stay of proceedings could be ordered. As the defence has not provided any of this information in its notice of application or in the course of oral arguments, I have to conclude that no anticipated evidentiary basis or facts have been alleged upon which this complaint could possibly amount to an abuse of process.

[38] As it pertains to the residual category, it is alleged that by their conduct, certain actors from the CFNIS, the chain of command and legal advisors deliberately hindered Captain Iredale's attempts to obtain counsel, first by failing to provide the toll-free number for the Director of Defence Counsel Services (DDCS) and then by virtue of the fact that a "Request for defence counsel" form signed by Captain Iredale on 27 May 2019 was not received until 20 August 2019, thereby undermining the integrity of the judicial process. (Notice of Application, paragraphs 10(j),(k),(l),(w),(y),(z),(dd) and 37)

[39] Once again, I find no merit in this complaint, on its face. There was no obligation on investigators communicating by phone with Captain Iredale to provide him with the toll-free number for the DDCS as he was obviously not under arrest at the time. From the facts alleged I conclude that, during the investigation, Captain Iredale was at no time in the physical presence of

investigators wanting to obtain a statement from him. Captain Iredale refused to meet with investigators as he was entitled to. In these circumstances, a failure to provide a toll-free number for a lawyer cannot possibly undermine the integrity of the judicial process.

[40] As it pertains to the delay in submitting the "Request for defence counsel" form, it must be kept in mind that the responsibility to advise DDCS of the wishes of an accused person as it pertains to legal representation rests with the commanding officer of the accused and is triggered at the time an application is made to a referral authority for disposal of a charge (QR&O 109.04). That referral occurred on 24 June 2019, according to the facts provided in the defence application. As the form was received on 20 August 2019, we are dealing with a two-month delay in transmitting the form. However, the charge sheet was only signed on 9 December 2019 and the disclosure provided to defence on 2 January 2020. I conclude therefore that what occurred during the two months period when the form should have been transmitted is the referral to the Director of Military Prosecution by the referral authority and the beginning of the post-charge review by a prosecutor. This period of time does not involve any significant defence work as the final charges to be preferred are not yet known. Thus, the delay could hardly ground a finding that the integrity of the judicial process was undermined, let alone warrant a stay of proceedings.

[41] Therefore, as it pertains to the residual category, too, I must conclude that no anticipated evidentiary basis or facts have been alleged on which the complaints could possibly amount to an abuse of process.

Conclusion

[42] In the exercise of my duty to manage these proceedings, I have decided to grant the prosecution's motion to dismiss defence's application seeking a stay of proceedings on the basis of alleged violations of Captain Iredale's rights under section 7 of the *Charter*. Indeed, the defence has failed to provide an anticipated evidentiary basis or facts upon which the complaints it makes in its application could possibly amount to a violation of principles of fundamental justice or an abuse of process. The application could not possible lead to a stay of proceedings being ordered. Consequently, I must conclude that the application by the defence has no reasonable prospects of success and must be summarily dismissed without hearing.

FOR THESE REASONS, THE COURT:

[43] **GRANTS** the prosecution's motion for summary dismissal.

[44] **DISMISSES** the defence application for a remedy resulting from violations of the applicant's rights under section 7 of the *Charter*.

Dated this 16th day of July 2020, at the Asticou Centre, Gatineau, Quebec

("J.B.M. Pelletier, Commander")
Presiding Military Judge

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh and Major M.-A. Ferron, Prosecutor and Counsel for the Moving Party

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Captain M.J. Iredale, Counsel, the Accused and Respondent