COURT MARTIAL

Citation: *R. v. Zapata-Valles*, 2022 CM 3011

Date: 20210708
Dockets: 202036

Standing Court Martial

The Lorne Scots Regiment
Brampton, Ontario, Canada

Between:

Corporal A.A. Zapata-Valles, Applicant

- and -

Her Majesty the Queen, Respondent

Application heard in Brampton, Ontario, on 4 April 2022
Decision rendered orally in Brampton, Ontario, on 6 April 2022
Written reasons delivered in Gatineau, Quebec, 8 July 2022

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

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could identify the persons described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

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

Introduction

[1] Corporal Zapata-Valles is charged with one offence punishable under section 130 of the *National Defence Act* (*NDA*), for sexual assault, contrary to section 271 of the *Criminal Code*. This alleged offence would have occurred on or about 14 to 15 September 2017 at or near Brampton Armouries in Brampton, province of Ontario.

[2] On 18 January 2021, the Court Martial Administrator (CMA) signed a convening order for this charge to be dealt with by a Standing Court Martial (SCM) on 31 May 2021 at Brampton Armouries in Brampton, province of Ontario. I was assigned as the military judge to preside at this court martial.

[3] Corporal Zapata-Valles filed the present application on 21 March 2022 as a matter to be heard by the military judge assigned to presiding at the court martial.

[4] Corporal Zapata-Valles is seeking an order from the presiding military judge for a stay of proceedings pursuant to subsection 24(1) of the *Charter* for an alleged infringement of his right to be tried within a reasonable time guaranteed under paragraph 11(*b*) of the *Charter*.

The evidence

[5] The evidence considered by the Court on this application is, in addition to the notice of application made in writing:

(a) the Record of Disciplinary Proceedings (RDP) for Corporal Zapata-Valles dated 30 April 2020;

(b) a copy of three pages from a military police investigation report and partially redacted;

(c) a copy of the charge sheet introduced before this court martial and dated 1 September 2020;

(d) the written response provided by the prosecution to the notice in writing concerning the present application;

(e) a twenty-four-page transcript of these proceedings;

(f) a copy of the audio-recorded coordination conference call I presided over on 29 October 2020 to set a trial date for this case; and

(g) a copy of the four audio-recorded trial management conference calls held with the parties on 7 and 21 May 2021, on 14 July 2021, and on 30 March 2022.

The facts

[6] From this evidence, I will summarize what I consider to be the relevant circumstances to this case in order to decide this issue.

[7] The alleged incident in support of the charge would have occurred on or about 14 to 15 September 2017.

[8] S.R., the alleged victim in this matter, made an initial complaint to the military police (MP) services on 10 September 2019. It triggered the start of an investigation. S.R. was interviewed by the MP services on the day after she filed it, which is on 11 September 2019.

[9] On 21 November 2021, Corporal Zapata-Valles met with the MP services. Further to a consultation with a lawyer, he declined to provide any statement regarding the allegation made by S.R.

[10] The pre-charge screening package, which included the investigation report on this matter, was sent on 3 February 2020 by the MP services to the Director of Military Prosecutions (DMP) for legal advice on a potential charge to be laid by a representative of the Canadian Forces National Investigation Services (CFNIS).

[11] On 30 April 2020, Corporal Côté, a member of the MP services assigned to investigative duties with the CFNIS, laid a charge under section 130 of the *NDA*, for sexual assault, contrary to section 271 of the *Criminal Code*, against Corporal Zapata-Valles in relation to the alleged incident for which S.R. made a complaint.

[12] The matter was referred by the unit Commanding Officer to the referral authority on 25 May 2020. On 5 June 2020, the referral authority referred the matter to DMP. The referral package was received by DMP on 25 June 2020.

[13] Major Dhillon, as a DMP's representative, signed the charge sheet on 1 September 2020. The charge was preferred on 2 September 2020.

[14] On 29 October 2020, at the request of the parties, a coordination conference call took place for setting a date for the trial. The defence counsel kindly provided information on the preliminary matters for which he was giving consideration and which may result in the presentation of three different preliminary applications:

(a) first, an application claiming a violation of the right of his client to a hearing by an independent and impartial tribunal, in accordance with paragraph 11(*d*) of the *Charter* and, as a remedy, requesting an order for staying the proceedings;

(b) second, an application raising the constitutional validity of sections 278.93 and 278.94 of the *Criminal Code*; and

(c) if the second application does not succeed, an application for a hearing under section 278.94 of the *Criminal Code* to determine whether some specific evidence is admissible under subsection 276(2) of the *Criminal Code*.

[15] During this conference call, the prosecution specified that it was not available before the month of April 2021 to proceed with the trial. To the same effect, the defence counsel said that he was not available before the month of May 2021. Accordingly, with the agreement of the parties, the trial was set to commence on 31 May 2021 for a duration of two weeks.

[16] As the Acting Chief Military Judge presiding at this coordination conference call, I specified that if the defence counsel intended to present any of the preliminary matters he referred to, prior to a military judge being assigned to preside at the court martial, he should file them and a military judge will be assigned accordingly in order to have the court martial convened, considering that the nature of the matters he would like to raise before the Court can only be decided by the military judge presiding at the court martial.

[17] I also mentioned that it belongs to the parties to raise any matter to be decided sufficiently in advance to allow the military judge assigned to preside at the court martial to appreciate if a matter will be dealt with as a preliminary proceeding prior to the commencement of the court martial, or after it has started but prior to the plea to be made by the accused to the charge.

[18] On 15 January 2021, I was assigned to preside at the court martial of Corporal Zapata-Valles.

[19] On 18 January 2021, the CMA signed the convening order for the SCM of Corporal Zapata-Valles to take place on 31 May 2021 at Brampton Armoury, in Brampton, province of Ontario and the accused was summoned accordingly pursuant to subsection 165.19 (1.1) of the *NDA*.

[20] On 3 May 2021, Corporal Zapata-Valles, through his counsel, filed two applications with the prosecution and the Court: first, an application claiming a violation of his right to a hearing by an independent and impartial tribunal, in accordance with paragraph 11(*d*) of the *Charter* and, as a remedy, an order for staying the proceedings; second, an application raising the constitutional validity of sections 278.93 and 278.94 of the *Criminal Code*.

[21] As the military judge assigned to preside at the court martial of Corporal Zapata-Valles, I held a pre-trial conference call with the parties on 7 May 2021. The prosecution informed me that it intended to call three to four witnesses, and the presentation of its case would probably take something close to a week, which represented three to four days. The defence counsel told me that the paragraph 11(*d*) *Charter* application was brought to preserve the right of his client, knowing that it would probably be dismissed in regard of the previous decisions I delivered on the same matter, and that it would not take long to deal with it.

[22] The application raising the constitutional validity of sections 278.93 and 278.94 of the *Criminal Code* was then discussed. I indicated to the parties that the very first court martial decision on the issue was recently delivered by Military Judge Sukstorf in the court martial of Sergeant Tait, and I invited counsel to consult it when it would become available. I proposed to the parties to proceed with a hearing on this matter on 25 and 26 May 2021 and to deliver my decision on the day set for the trial, just before starting it, or even on a date prior to that, if I would be in a position to do so. The aspect concerning the third party-disclosure contained in the same application still needed to be discussed among the parties.

[23] The defence counsel indicated that he was uncertain with respect to the presentation of an application for a hearing under section 278.94 of the *Criminal Code* to determine whether some

specific evidence is admissible under subsection 276(2) of the *Criminal Code*. He wanted the Court to decide first about the constitutional validity of such a process, which was addressed by his other application, but he also informed the Court that some things were still under investigation on his side and he expected that it could take up to two weeks before he got the necessary information to make up his mind on the presentation of it. As a consequence, the defence counsel indicated that he may not pursue the constitutional issue he raised if he concludes that there is no need to proceed with a hearing regarding the admissibility of evidence potentially falling under the scope of subsection 276(2) of the *Criminal Code*.

[24] In the case where a hearing would be held regarding the constitutionality of these *Criminal Code* provisions, I informed the parties that I would like to proceed with a joint hearing about this issue, as the same matter was raised by a different accused in a different court martial I was presiding. The parties agreed that the hearing could be held in such a way. I then directed that a conference call take place on 21 May 2021 in order to provide the defence counsel an opportunity to let me know if he will proceed or not with the application raising a constitutional issue. Counsel agreed that if we proceed, that it would be done remotely on 26 May 2021.

[25] I then held another conference call with the parties on 21 May 2021. Defence counsel informed me that he intended to proceed with the application raising the constitutional validity of sections 278.93 and 278.94 of the *Criminal Code*. I confirmed that it would be a joint hearing. Defence counsel announced that he abandoned the aspect of the application referring to the third-party disclosure issue. Accordingly, the prosecution informed me that they withdrew its application to quash the application of the accused on this very specific question. I confirmed with the parties that the hearing would take place in a hybrid mode. The prosecution raised concerns about the ability of the Court to proceed on the dates set for the trial. The defence counsel confirmed his intent to present an application for a hearing under section 278.94 of the *Criminal Code* to determine whether some specific evidence is admissible under subsection 276(2) of the *Criminal Code*, if the application on the constitutional issue is dismissed by the Court. I then suggested to the parties to proceed with the hearing on the constitutional issue first and when I provide my decision on it, we may then look how the Court would proceed.

[26] On 25 and 26 May 2021, the joint hearing regarding the constitutionality of some *Criminal Code* provisions took place.

[27] On 31 May 2021, prior to the commencement of the trial, I provided my decision on that constitutional issue raised by Corporal Zapata-Valles and another accused, and I dismissed the application.

[28] Then, on 31 May 2021, the trial commenced. I heard and dismissed the paragraph 11(*d*) *Charter* application submitted by Corporal Zapata-Valles. Then some discussion took place on how to deal with the application for a hearing under section 278.94 of the *Criminal Code* to determine whether some specific evidence is admissible under subsection 276(2) of the *Criminal Code*. As a result, it was decided to proceed with the hearing on the application during the second week set for the trial and to have, instead, the trial take place on the week of 5 and 12 July 2021. I adjourned the court martial to the next day in order to allow everybody to look at the situation and confirm their availability in order to proceed with this proposed scheduling, which

would include myself as I had to consider moving some hearings already planned in the judicial calendar.

[29] On 1 June 2021, I confirmed the availability of all participants. Then, I directed defence counsel to file his notice in writing for the application by 4 June 2021, and that the hearing took place in hybrid format on 8 June 2021. It was confirmed with counsel that the trial would then take place on 5 July 2021 for a period of two weeks. I adjourned the trial to 8 June 2021.

[30] The defence counsel filed his application on 6 June 2021.

[31] On 8 June 2021, the court martial sat but I had to adjourn the hearing because defence counsel had issues with air conditioning at home. The hearing was adjourned to the next day.

[32] Finally, the hearing concerning Corporal Zapata-Valles's application for a hearing under section 278.94 of the *Criminal Code* to determine whether some specific evidence was admissible under subsection 276(2) of the *Criminal Code* took place. On 30 June 2021, I delivered my decision remotely to the parties and I dismissed the application. Then, I adjourned the case to 5 July 2021 in Brampton.

[33] On the morning of 5 July 2021, because of the warm weather, the court was moved to a location where air conditioning was available. Then, in the afternoon, the prosecution started the presentation of its case and the Court heard the first witness.

[34] On the morning of 6 July 2021, the defence counsel informed the Court that he was contacted the evening before by a potential witness that has extremely compelling and on-point evidence, which would be of an exculpatory nature in respect of the charge against his client. He mentioned that he had no idea about the existence of this potential witness before, and this situation did not arise from a disclosure made by the prosecution. Considering the situation, I agreed to adjourn the trial to the next day.

[35] A discussion occurred regarding the presence of the complainant's parents as support persons, as it was announced by the prosecution that the next witness to be called would be the complainant. Further to discussion, I authorized the complainant's parents to attend the proceedings in the courtroom. However, they were not allowed to stay in the room used by her outside the courtroom while the Court adjourned. In addition, the prosecution committed to explain to both parents that they could not discuss with the complainant the case or her testimony while testifying before the Court, despite the fact that she resides with them.

[36] On 7 July 2021, the prosecution called the complainant as a witness to testify before the Court. Her examination-in-chief took about two hours to be completed. The defence counsel commenced the cross-examination of the witness at the beginning of the afternoon. At the end of the afternoon, the trial was adjourned to the next morning. The total time spent by the Court for the cross-examination of the complainant on that day was about two hours and a half, and the complaint herself had been in the courtroom answering questions for about two hours.

[37] On 8 July 2021, the defence counsel raised an issue with the presence of the parents in the courtroom as he intended to ask questions concerning the relationship she has with them, especially on the topic of sexual education and discussions that may have occurred among them on this issue. Lengthy discussions occurred on this issue and I finally ordered that the complainant's parents stay outside of the courtroom while these topics would be explored by the defence counsel, which they did. Once I heard the evidence, I concluded that there was no reason to forbid their presence in the courtroom anymore and they were invited to come back in the courtroom and attend the proceedings. The result was that the total time spent for the cross-examination of the complainant on that day was about an hour and a half, but the complainant had been in the courtroom answering questions for about forty minutes.

[38] On 9 July 2021, the defence counsel continued with his cross-examination. About two minutes after starting questions, the prosecution made an objection, claiming that the question asked by the defence counsel raised a collateral issue. A long debate occurred regarding this matter and I provided my decision on it at the beginning of the afternoon, which resulted in allowing the question to be asked. The cross-examination of the complainant resumed for about ten minutes. Then I dealt with another objection made by the prosecution. I upheld it. In my decision, I indicated that to be allowed to ask such a question, an evidentiary basis needed to be established first. Then, the defence counsel indicated that the evidence he considered necessary to do such thing was at home and not with him in court. He then suggested adjourning the case to Monday. The total time spent for the cross-examination of the complainant on that day was for about a total of two and a half hours, and the complaint had been in the courtroom answering questions for about twelve minutes.

[39] In order to progress with the testimony of the complainant and to respect the scheduling that we had set for the conduct of the trial, I therefore indicated to the parties that for the purpose of efficiency, I was considering sitting on the Sunday, as defence counsel was not available on the Saturday. Further to a discussion with the parties, I adjourned the case to the Sunday.

[40] In the morning of Sunday, 11 July 2021, the defence counsel raised in chambers two issues prior to coming into the courtroom. First was the fact that a discussion had occurred between an orderly escorting the complainant and the complainant herself on the Friday. I suggested that the defence lawyer explore this issue in a little more detail with the complainant in the courtroom, and then provide me with his comments on the situation. He proceeded as I suggested but nothing resulted from that further investigation of the complainant regarding this matter.

[41] The second matter raised in chambers was a request for an adjournment by the defence counsel in order to bring an application for a mistrial. The reason provided was that defence counsel needed more time to research because he considered that harm was caused by the prosecution to the cross-examination he was conducting. In addition, he considered that because of undue objections made by the prosecution since the beginning of his cross-examination of the complainant, he had an additional reason to bring this application. Finally, he indicated to the Court that because of the Court's earlier ruling with respect to the requirement to provide an evidentiary basis for the questions he felt this had an intimidating effect on the defence.

[42] I heard arguments in the morning on the application for an adjournment made by defence counsel, and I delivered my decision at the beginning of the afternoon. I concluded that Corporal Zapata-Valles did not demonstrate to the Court that an adjournment was desirable, nor useful or necessary in the circumstances and I dismissed the request. In addition, I indicated in my decision that my decision on the objection made by the prosecution on a matter being a collateral issue on the Friday did not, implicitly or explicitly call on the defence counsel to provide specific evidence to the Court as the function of the Court is certainly not to make the case of any party. It was the own perception of the defence counsel on the ruling made by the Court, while no direction whatsoever was provided by the Court in any shape or form. As I said in my ruling, I came to the conclusion that the defence counsel had not established the necessary evidentiary foundation to allow him to ask the questions he intended to ask. I certainly did not direct him how to produce such evidence, if he wanted to ask the question.

[43] Then, the total time spent for the cross-examination of the complainant by the Court on that day was for about a total of two hours and a half, and the complainant herself had been in the courtroom answering questions for about two hours.

[44] On the morning of 12 July 2021, the defence counsel filed with the Court and the prosecution a written notice for an adjournment for a minimum of two weeks, raising that repeated objections made by the prosecution and some rulings I made had an intimidating effect on him, disrupted the rhythm of his cross-examination of the complainant, and manifestly constrained its scope. In addition, he claimed that the way the prosecution raised an objection in Court resulted in an abuse of process regarding the cross-examination of the complainant he was conducting. He claimed that the constitutional right of his client to be tried fairly shall take priority over the right to be tried within a reasonable time, and despite the fact that the matter would be delayed because of the request he was making, it would still allow him to deal with issues that may cause irreparable prejudice to the accused.

[45] He also filed at the same time with the Court and the prosecution a written notice for a mistrial application, on the same basis he made the application for an adjournment.

[46] I requested an offer of proof from defence counsel concerning the request he made for an adjournment and I heard both parties on that request. Again, I dismissed the application on the same grounds I mentioned the day before on the exact same issue made to the Court, reminding the defence counsel that his client was entitled to a fair trial, not a perfect one. As a result, as I concluded that there was no basis to proceed with the adjournment, thus the application for a mistrial made on the exact same ground was not considered by the Court as well.

[47] When I invited the defence counsel to proceed with his cross-examination of the complainant, he requested an adjournment to the next day in order to consider renewing his application claim of a violation of the right of his client to a hearing by an independent and impartial tribunal, in accordance with paragraph 11(*d*) of the *Charter*, for reasons different than those he grounded the one presented at the beginning of this trial. I adjourn the case for fifteen minutes and invited the defence counsel to consider proceeding with the cross-examination for now, as he could give consideration to this other application during the evening. On his return in the courtroom, defence counsel indicated that he was ready to continue with the cross-

examination of the complainant, which he did. The total time spent by the Court for the cross-examination of the complainant on that day was for about a total of two hours, and the complaint herself had been in the courtroom answering questions for about an hour. At the end of the day, I adjourned the court to the next day.

[48] On 13 July 2021, the defence counsel proceeded with the cross-examination. The total time spent by the Court for the cross-examination of the complainant on that day was for about six hours, and the complaint herself had been in the courtroom answering questions for about two hours 40 minutes. At some point during the day and also at the end of it, the defence counsel announced that he would like to file an application seeking the production of a claim filed by the complainant with the CAF – Department of National Defence (DND) Sexual Misconduct Class Action Settlement. He suggested excusing the witness for the next day of the proceedings for allowing the Court to deal with this specific application.

[49] I agreed with the suggestion made by the defence counsel and reminded him that the Court expected that the complainant's testimony would be completed by the end of the week. I was informed by the prosecution that it still had three witnesses to call and it would probably take a maximum of two days to conclude the presentation of its case once the complainant's testimony would be terminated. The defence counsel announced that the presentation of a defence would probably take three days.

[50] Then, I suggested to the parties to consider the week of 23 or 30 August 2021 to complete this trial. The defence counsel said that he could not make himself available due to other activities he had with a new consulting company he had just launched. He suggested completing this trial during the month of April 2022. I suggested to defence counsel to have a discussion with his client to consider when this trial will continue, as it clearly appeared that this trial would not end as anticipated on 16 July 2021. The defence counsel informed me that he was scheduled for another court martial in January 2022 for which a paragraph 11(*b*) *Charter* application would be dealt with in October 2021, which may potentially provide him an opportunity to become available earlier than the month of April 2022 to deal with the present matter. The prosecution informed the Court that it would be available on the week of 23 August 2021 to continue with this trial. I adjourned the case to the beginning of the afternoon of the next day and instructed that the complainant to be informed that she was requested to come to court only two days later, which was on 15 July 2021.

[51] On the morning of 14 July 2021, I held a trial management conference call with the parties at the request of the defence counsel. Essentially, he indicated that his time estimation was too hopeful and that he would be ready to file the notice in writing for the third party disclosure application only on the next morning. I directed him to file the application on the next morning and that the Court will proceed with the hearing on it in the afternoon.

[52] The defence counsel filed the notice in writing for his application in the morning of 15 July 2021 and the Court proceeded with a hearing for this application in the afternoon. Meanwhile, I directed that the complainant be informed that she did not need to come to the Court before the following day.

[53] In his application, the defence counsel was seeking the production of the claim filed by the complainant in relation to a Sexual Misconduct Class Action Settlement because he considered that the prospect of financial compensation was a strong incentive for the complainant to make her complaint for sexual assault against the accused and to exaggerate or otherwise falsify details of her allegations for being sexually assaulted by him, especially regarding the issue of consent.

[54] The prosecution was of the view that such an application was without merit and that there is no need for the Court to enter into any kind of hearing at this stage, as the evidence does not support, on its face, a requirement for doing so.

[55] On the morning of 16 July 2021, I delivered my decision on this application, which I summarily dismissed. I concluded that there was no factual basis advanced by the applicant to suggest that a claim by the complainant under the class action agreement is even potentially relevant beyond speculation, and that there is no factual basis at this stage for the Court to consider that Corporal Zapata-Valles may succeed in establishing an air of reality concerning a defence of motive to fabricate.

[56] Then, the defence counsel completed his cross-examination of the complainant, which lasted about 7 minutes. The prosecution took about fifteen minutes to proceed with the re-examination of the complainant, and the Court asked questions to the complainant for about ten minutes, and the complainant was excused by the Court, considering her testimony complete.

[57] The prosecution suggested adjourning the case to a different time in order to complete this trial and to have a discussion for setting dates to proceed with the remainder of the trial. The prosecution still had three witnesses to call, while defence counsel said that he may have six to seven witnesses to call. The defence counsel queried the Court as to whether anything could be done to make the time he had scheduled for a different matter before a court martial in January 2022 be used for the present matter. I indicated to him that considering that the military judge, having already presided and decided over some matters in this other court martial, then it made it impossible for me to impose any scheduling on it in my capacity as the Acting Chief Military Judge in order to deal with this court martial.

[58] The defence counsel then suggested that the Court consider taking the date set for another court martial in December 2021 for which he was involved and used that date for this court martial. However, the court martial in question could be difficult to reschedule as the date for the eighteen-month ceiling was ending on the next month, which was January 2022.

[59] The defence counsel submitted that a period of two weeks shall be considered by the Court to complete the trial. He informed the Court that he was contemplating another application different from the one the Court had just dealt with. In an abundance of caution, I suggested that considering what still had to be accomplished before the Court by the two parties, a two-week period for this trial would be justified.

[60] In addition to its availability in the month of August 2021, the prosecution indicated that it was available for all month of October 2021 and after to proceed with this case.

[61] The defence counsel indicated to the Court that he discussed the issue of the trial being adjourned to another date with his client and he said that Corporal Zapata-Valles was understanding of the situation.

[62] The defence counsel said that if things changed in September 2021 regarding his availability, he would certainly inform the Court. However, at the time, the Court availability in September 2021 was very limited, which made it likely difficult to continue with this court martial earlier, regardless of defence counsel availability.

[63] In this circumstance, considering the availability of all participants, I adjourned the case to 4 April 2022. I ordered that a transcript of the proceedings be prepared in order to have this tool as a reference for helping to proceed with the remaining of this case later.

[64] On 17 August 2021, the prosecution inquired by email with me, through the clerk court reporter, about the possibility to have this court martial proceed in January 2022, as judicial schedule had been freed up because of the withdrawal of charges in a different case scheduled to take place at that time. On 20 August 2021, a response to that query was provided by the clerk court reporter, which stated:

> "I received this morning a response from the presiding judge which indicated for me to advise counsel that he was informed in the courtroom on Wednesday by Major Langlois, as the DDMP, that the prosecution preference was to have the matter of Kohlsmith rescheduled on 10 January 2022 for two weeks, instead of continuing the CM of Cpl Zapata-Valles in that period of time. As such, it seems that the request made by the prosecution is moot. I was asked to inform counsel that further to that decision made by the prosecution, the presiding judge is not available to continue the proceedings for the SCM of Cpl Zapata-Valles and, accordingly, he does not see any need for a teleconference, unless there is something else to discuss."

[65] The defence counsel was carbon copy on this email exchange between the prosecution and the court clerk reporter.

[66] On 21 March 2022, Corporal Zapata-Valles, through his counsel, filed a notice in writing regarding the present application the Court is dealing with.

[67] On 30 March 2022, I held a conference call with counsel to discuss trial management issues related to the hearing of this application and the conduct of the remainder of this trial if the application is dismissed. I authorized the prosecution to provide a response in writing to expedite the hearing of the application.

[68] The prosecution filed its response in writing on 1 April 2022.

[69] The hearing of this application took place on 4 April 2022.

The law

[70] Paragraph 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.

[71] As said by the Court Martial Appeal Court (CMAC) in *R. v. LeGresley*, 2008 CMAC 2, at paragraph 36:

> It is useful at this point to briefly review the interests that s. 11 of the *Charter* is designed to protect. The primary purpose of s. 11(*b*) is the protection of the individual rights of accused persons: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh. A secondary interest of society as a whole has also been recognized by the Supreme Court (*Morin*, above), namely that those who are accused of crimes are brought to trial and dealt with according to the law and are treated humanely and fairly.

[72] The *NDA* also expresses the need for proceeding promptly with a charge laid pursuant to a provision of the Code of Service Discipline within a reasonable time.

[73] Section 162 of the *NDA* reads as follows:

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

[74] The Court Martial Appeal Court (CMAC) commented on such requirement made by this provision in the decision of *R. v. Langlois*, 2001 CMAC 3 at paragraph 14:

> I do not feel that s. 162 is very helpful, as it only restates in its own way s. 11(*b*) of the Charter. Section 11(*b*) takes priority, of course, and s. 162 clearly cannot be construed so as to limit the rights conferred on an accused by s. 11(*b*).

[75] To determine if the constitutional right of an accused person to be tried within a reasonable time has been violated, contrary to paragraph 11(*b*) of the *Charter*, the Supreme Court of Canada (SCC) decided in 2016 in its decision of *R. v. Jordan*, 2016 SCC 27 that a change of direction was required, and accordingly set out a new framework for applying paragraph 11(*b*) of the *Charter*. The latter decision was confirmed the following year by another SCC judgment in *R. v. Cody*, 2017 SCC 31.

[76] In *R. v. Thiele*, 2016 CM 4015, *R. v. Cubias-Gonzalez*, 2017 CM 3003, *R. v. McGregor*, 2019 CM 4011, *R. v. Tuckett*, 2019 CM 3006 and *R. v Stacey*, 2019 CM 3017, and more recently in the court martial of Sergeant Kohlsmith, courts martial have established and confirmed that the presumptive ceiling of eighteen months (548 days) discussed by the SCC decisions in *Jordan* and *Cody* is applicable to a person subject to the Code of service discipline appearing before a court martial.

[77] I would add that the SCC decision in *R.* v. *K.J.M.*, 2019 SCC 55, seems to confirm the approach taken by courts martial on this subject. Justice Moldaver, on behalf of the majority, clearly recognized in that decision that the presumptive ceiling of eighteen months must be applied with respect to a separate judicial system for which the need that a case to be dealt with quickly has been established. The need for new ceilings was not accepted by the Supreme Court because, in its opinion, this would have the effect of undermining the existing uniformity on this issue and would lead to a multiplication of ceilings determined in accordance with a different recognized level of prejudice and a different accepted group of people, making it impractical and unrealistic to apply them.

[78] Regarding the remedy, the minimum one applied by Canadian courts in the event of a violation of a person's right to be tried within a reasonable time provided for in paragraph 11(*b*) of the *Charter*, is a stay of proceedings, as indicated in *R.* v. *Rahey*, [1987] 1 S.C.R. 588.

[79] Then, as established in *Jordan*, in order to ultimately decide whether or not Corporal Zapata-Valles' right to be tried within a reasonable time has been violated, I must make some mathematical determinations:

(a) first, calculate the total time between the laying of the charges and the actual or anticipated end of the trial (the overall delay); and

(b) then, I must subtract the period of delay waived by the accused or that he caused by his conduct.

[80] It is worth recalling that the SCC clarified the meaning of the terms “anticipated end of the trial” in its decision in *R. v. K.G.K.*, 2020 SCC 7, when it mentions at paragraph 31:

> Properly construed, the *Jordan* ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. That is when the parties’ involvement in the merits of the trial is complete, and the case is turned over to the trier of fact. As I will explain, this date permits the straightforward application of the *Jordan* framework in a manner consistent with its design and goals.

[81] Following the subtraction of the delay attributable to the applicant, if the net result concerning the delay due to this mathematical operation is greater than eighteen months, it is presumed to be unreasonable. It is then up to the prosecution to justify the delay due to exceptional circumstances which fall into two categories: discrete events and particularly complex cases. If the prosecution fails to justify the delay, I must conclude that Corporal Zapata-Valles' right to be tried within a reasonable time under paragraph 11(*b*) of the *Charter* has been violated.

[82] On the other hand, if the result of this calculation is lower than the relevant ceiling, i.e. eighteen months, it is then up to Corporal Zapata-Valles to demonstrate that the delay in question is nevertheless unreasonable in order to demonstrate a violation of paragraph 11(*b*) of the *Charter*.

Position of the parties

Corporal Zapata-Valles

[83] The applicant, through his counsel, claimed that there is no period attributable to him arising from actions or decisions he took. According to him, the defence preliminary matters dealt with by the Court, some unexpected issues he raised such as the class action claim made by the complainant for which he requested the disclosure, and any other strategic decisions he made to defend himself throughout the proceedings cannot be considered by the Court as resulting in delays he solely and directly caused, which prevents them from being deducted from the overall delay.

[84] He submitted to the Court that all actions he took in the course of the conduct of his defence were legitimate and shall not be used against him. As a result, the total delay exceeds the presumptive ceiling of eighteen months and it is therefore up to the prosecution to justify it. In his view, this delay does not come from the complexity of the case, which leaves the Court with the exceptional discrete events that the prosecution could rely on.

[85] As there is no exceptional discrete event that was proven by the prosecution, then, in the circumstances, Corporal Zapata-Valles therefore asks the Court to declare that his constitutional right to be tried within a reasonable time has been violated and, consequently, to stay the proceedings.

The prosecution

[86] The prosecution took the perspective that this matter was delayed only because of the actions and decisions taken by the applicant, and as a result, any additional delay should be attributable to Corporal Zapata-Valles. Then, according to the prosecution, once the delay solely caused by the accused is subtracted from the overall delay, it brings the net delay below the presumptive ceiling of eighteen months.

[87] More specifically, the prosecution claimed that three specific periods of delay shall be attributed solely to the applicant:

(a) a period of 30 days for setting the trial in the month of May 2021, while the prosecution and the military judge assigned to preside the court martial were both available to commence it on the month prior;

(b) a period of 35 days due to the moving of the anticipated end of the trial from 11 June 2021 to 16 July 2021 resulting from the filing on short notice by Corporal Zapata-Valles of his preliminary written notices of applications, which obliged the Court to consider moving the dates initially set for trial in order to deal with these applications; and

(c) a period of 273 days for moving the anticipated end of the trial from 16 July 2021 to 15 April 2022, because of the sole actions of the applicant, first in the course of

> his cross-examination of the complainant, which resulted in the remainder of the trial being postponed to another date, and second, in relation to his own unavailability before April 2022 while the prosecution and the military judge were both available quite sooner to complete the trial.

[88] In short, the prosecution put to the Court that the right of an accused person to be tried within a reasonable time cannot be used as a sword and as a shield at the same time, and it asked the Court to dismiss the application accordingly.

Analysis

The overall delay

[89] Applying the test, the first step is to calculate the total number of months from the time the charge was initially laid to the anticipated completion of the trial. The charge against Corporal Zapata-Valles was laid on 30 April 2020. The anticipated end of the trial is on 15 April 2022, which makes an overall delay of 715 days or 1 year, 11 months and 15 days.

[90] However, the applicant suggested in his writing submissions that in circumstances such as the ones in this case, the calculation of the overall delay should start from the time the charge ought to have been laid against the applicant, which is on 11 December 2019, because it is the date for which the last investigative step was made by the investigator and the investigation concluded.

[91] To support its suggestions, he referred the Court to some decisions, like *R.* v. *Gleiser*, 2017 ONSC 2858, *R.* v. *Albadry*, 2018 ONCJ 114 and *R.* v. *Luoma*, 2016 ONCJ 670. In the latter decision, the trial judge decided that the starting point to calculate the delay was where authorities were able to swear an Information, such as further to the arrest and the completion of the investigation, making such person subject to the court process.

[92] The applicant argued that if paragraph 11(*b*) of the *Charter* is intended to protect him against protracted exposure to the criminal law process, including the uncertainty of what will happen and the stigma of being caught up in the penal justice system, then as a matter of principle, the delay shall be computed from the time the investigation was completed, and not from when he was initially charged.

[93] This argument was previously raised before some courts martial and it was rejected. In *R.* v. *Tuckett*, 2019 CM 3006, the military judge clearly stated that the starting point to calculate the delay for the purpose of a paragraph 11(*b*) *Charter* application is when the charge is laid, as established by the SCC in *R.* v. *Kalanj*, [1989] 1 S.C.R. 1594, at page 1607, and as confirmed by the CMAC in *LeGresley*, at paragraph 41. I reiterated this approach in a decision which raised the same question in the court martial of Sergeant Kohlsmith.

[94] As a matter of *stare decisis*, it is clear that this Court is bound by the SCC and by the CMAC decisions on this issue, and not by one made by the Ontario Court of Justice. As it was said by the SCC in *Kalanj* at page 1609 and the CMAC in *R.* v. *Perrier*, CMAC- 434, for

anything occurring prior to the laying of a charge, the rights of an accused are protected by general law and guaranteed by sections 7 to 10 of the *Charter*.

[95] Then, for me, calculation of the total number of months does not change and the overall delay remains 715 days (1 year, 11 months and 15 days).

The net delay

[96] The second step consists of determining whether certain periods of the overall delay are attributable to the applicant, which would automatically reduce the total delay to be considered for the analysis. It can be any delay that the defence has waived or a delay that results solely from its conduct.

[97] Corporal Zapata-Valles did not make a clear and unequivocal waiver for any period of the overall delay.

[98] Regarding the delay caused by defence conduct, here is what the SCC said on this specific matter in *Cody* in paragraphs 28 to 33:

> [28] In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (*Jordan*, at para. 113). It applies to any situation where the defence conduct has "solely or directly" caused the delay (*Jordan*, at para. 66).
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> [29] However, not all delay caused by defence conduct should be deducted under this component. In setting the presumptive ceilings, this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have "already accounted for [the] procedural requirements" of an accused person's case (*Jordan*, at para. 65; see also paras. 53 and 83). For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted (*Jordan*, at para. 65).
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> [30] The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. As we said in *Jordan*, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (*Jordan*, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (*Jordan*, at para. 64). These examples were, however, just that — examples. They were not stated in *Jordan*, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in *Jordan*, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).
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> [31] The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
>
> [32] Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence

> action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a section 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
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> [33] As well, inaction may amount to defence conduct that is not legitimate (*Jordan*, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(*b*) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently" (*Jordan*, at para. 138).

[99] In this case, what attracted scrutiny from the Court were the various decisions and the manner in which different procedural steps were conducted by Corporal Zapata-Valles, especially their timeliness, both preliminary and during the course of the trial. More specifically, the Court wishes to take a closer look at the following elements:

(a) the presentation of a constitutional issue concerning some *Criminal Code* provisions;

(b) the presentation of an application for determining admissibility of some evidence pursuant to subsection 276(2) of the *Criminal Code;* and

(c) various issues arising in the course of the cross-examination of the complainant, such as:

i. request for third party record disclosure;

ii. the presentation of an application for a mistrial

[100] In order to decide if all these issues may have played a role in delaying the proceedings of this court martial and were caused by the sole conduct of the defence, the Court has to consider all the circumstances surrounding them.

The presentation of a constitutional issue concerning some *Criminal Code* provisions

[101] It is during the coordination conference call I held as the Acting Chief Military Judge at the end of the month of October 2020 that the applicant, through his counsel, mentioned for the first time of his intent to raise a legal issue regarding the constitutional validity of sections 278.93 and 278.94 of the *Criminal Code*. I mentioned two things during that conference call: first, that it would be necessary for any of the parties, which included him, that such a matter shall be raised sufficiently in advance to allow the military judge to be assigned to preside at this court martial to appreciate how things should be conducted in order to proceed with the trial dates as set; and second, I indicated to both parties that if the court martial was not convened, once they decided to file and proceed with any legal matter, it was possible for me to assign a military judge to deal with it, as long it was not a legal issue that would need to be considered by

the military judge assign to preside at the court martial. Otherwise, I would assign a military judge to preside at the court martial in order to allow the CMA to convene the court, and then provide an opportunity to the parties to deal with any legal matter that needs to be decided by the trial judge.

[102] Nothing arose from the applicant between that moment in October 2020, and the time I was assigned to preside at this court martial in January 2021. This was 28 days before the date set for the commencement of the trial, a date which had been determined with the agreement of the parties six months before, that Corporal Zapata-Valles filed his application on this issue. On 7 May 2021, I held a conference call for trial management purpose in order to determine when and how I would proceed with this application.

[103] I learned from the defence counsel that he had not made his mind up regarding his intent to use these specific *Criminal Code* provisions if I dismiss his application on the basis of their constitutional validity, as he was still in a process of gathering relevant information to make such a decision. Despite this comment, I set a date for hearing his application six days prior to the commencement of the trial, with a commitment to provide my decision just prior to the beginning of the trial. I also ordered the defence counsel to file a notice to all Attorneys General regarding a constitutional question to be raised in order to allow them to let me know about their intent to comment or even appear before the Court on this legal issue.

[104] Two weeks later, which was ten days prior to the commencement of the trial, during another conference call I held on 21 May 2021, the defence counsel finally confirmed his intent to request that the Court make a determination on the admissibility of some evidence pursuant to subsection 276(2) of the *Criminal Code*, if I dismissed his application concerning the constitutional validity of the provisions framing the process for making such a decision on admissibility.

[105] Then, I heard the application on 25 and 26 May 2021 and provided my decision on the morning before the trial commenced, which was on 31 May 2021. I dismissed the application.

The presentation of an application for determining admissibility of some evidence pursuant to subsection 276(2) of the *Criminal Code*

[106] The trial commenced. I dealt first with an application raising the right of Corporal Zapata-Valles to be tried by an independent and impartial tribunal pursuant to subsection 11(*d*) of the *Charter* and dismissed it for the same reasons set out in two recent CMAC decisions. Then, the defence counsel requested an adjournment to the end of the week in order to draft and file his application concerning the admissibility of some evidence pursuant to subsection 276(2) of the *Criminal Code*.

[107] As I previously mentioned, some discussions occurred with the counsel on the manner to proceed with this application, and the impact it could have on the duration of the trial. After checking the judicial calendar and the availability of counsel, I suggested considering hearing the application during the time initially scheduled for the trial, and to reschedule days for the trial itself. I proposed to consider the weeks of the 5 and 12 of July 2021, which would result in

postponing the anticipated end of the trial by five weeks, which would be from 11 June to 16 July 2021. I then adjourned the trial to the day after.

[108] When we reassembled on the next day, both parties agreed to the suggested scheduling I made. Accordingly, I gave until 4 June 2021 to the defence counsel to file his application, with the understanding that we would proceed with the hearing of it on 8 June 2021.

[109] In practice, the defence counsel filed his application on 6 June 2021 and the Court reassembled on 8 June 2021. However, due to circumstances beyond his control, he requested the Court to adjourn the hearing to the day after, which I did. Then, on the next day, the Court heard the application concerning Corporal Zapata-Valles' application for a hearing under section 278.94 of the *Criminal Code* to determine whether some specific evidence is admissible under subsection 276(2) of the *Criminal Code* took place. On 30 June 2021, I provided my decision, which dismissed the application, and declared that a hearing under section 278.94 of the *Criminal Code* would not be held on the admissibility issues raised by the applicant.

[110] Here, as I said previously, it is with the timeliness of both defence applications that this Court is concerned. By considering proceeding as he did, which is to come with a very short notice on raising a constitutional issue, and by waiting for the result of it before drafting another related written notice for an application regarding the admissibility of some evidence, despite being told to raise such an issue the soonest he could, the defence counsel caused, by his sole actions, the anticipated end of the trial to be delayed by five weeks. Irrespective of its merit, the actions of the defence on this specific matter are considered by this Court not legitimate in the context of this paragraph 11(*b*) *Charter* application, because it exhibited marked inefficiency and marked indifference toward delay.

[111] Despite being warned about raising these issues early in the process, the defence counsel decided to raise them very close to the dates set for the trial. Such decision belonged entirely to his client, and was under his sole control. The defence counsel cannot be permitted to engage in such conduct and then have it count toward the *Jordan* ceiling. It is for all actors at court martial, including the accused, to be proactive and make sure that the trial will take place as scheduled, unless something he or she could not have foreseen or is not under his or her full control delayed it.

[112] It is my conclusion that the delay of 35 days (five weeks) being the result of moving the anticipated end of the trial from 11 June 2021 to 16 July 2021, was caused by the sole conduct of the applicant and shall be deducted from the total delay of 715 days, which now put the latter to 680 days.

Various issues arising in the course of the cross-examination of the complainant

[113] Now, I am turning to two issues that arose in the course of the cross-examination of the complainant.

[114] The defence counsel started the cross-examination of the complainant on 7 July and terminated it on the date anticipated for the end of the trial, which is on 16 July 2021.

[115] Over this period of ten days, seven different days were used in part or in full to proceed with such cross-examination. One day was used by the Court in the middle of this two-week trial as a pause for all the actors involved, which is a Saturday, and another day was used by the defence counsel to draft a notice in writing for an application he made to the Court, and finally the Court took one day to proceed with the defence's application hearing.

[116] In summary, the prosecution called the complainant as a witness. Her examination-in-chief by the prosecutor lasted about two hours and her re-examination by the same prosecutor lasted about 15 minutes. It took less than a day for the prosecution to proceed.

[117] Questions from the Court to the complainant lasted about 10 minutes.

[118] The complainant answered questions asked on cross-examination by the defence counsel for a total of about eight hours spread out through these seven days. The remaining time she did not spend in Court over these seven days in answering questions was used to debate and decide on objections made by counsels of both parties.

[119] Again, the timeliness of two applications made by the defence counsel during the cross-examination of the complainant is of concern to the extent that it could have had an impact on its duration, and therefore the overall delay of the trial.

[120] First, on the third day of the cross-examination of the complainant, there was a request for an adjournment of two weeks made by Corporal Zapata-Valles, through his counsel, for preparing a mistrial request. The grounds were essentially concerning undue objections made by the prosecution in the course of the cross-examination and the manner they were made. The Court spent about a half a day hearing this specific issue and it dismissed it on the ground that it was not demonstrated by the applicant that such an adjournment would be useful and necessary.

[121] On the day after, the applicant filed a notice in writing for renewing his request for an adjournment. In addition, he filed another notice in writing concerning a mistrial application. Essentially, he put to the Court that he would like the Court to adjourn for at least two weeks in order to prepare and substantiate his application for a mistrial. Essentially, he claimed that the interference made by the prosecution during the cross-examination of the complainant due to repeated objections disrupted the rhythm of it, and constrained its scope. In addition, he claimed that the prosecution was abusive in its manner when objecting to questions, as it did start to argue on the objections without asking the complainant to retire to avoid her listening to any of the arguments made to the Court.

[122] The Court requested an offer of proof from the defence and heard arguments on the necessity to hold a second *voir dire* on the application made for an adjournment. After two-thirds of the day was spent dealing with this issue, the Court then decided that the applicant did not establish any reason to hold another *voir dire* on the issue of an adjournment and it declined to proceed with a hearing on it.

[123] Corporal Zapata-Valles, through his counsel, requested twice an adjournment during the main trial. The defence did not hesitate to claim at that time that the constitutional right of Corporal Zapata-Valles to be tried fairly shall take priority over on the one to be tried within a reasonable time, and if the matter was delayed because of the request he was making, it did not matter, as long as it would allow him to deal with issues that may cause irreparable prejudice to the accused. The defence deliberately took this approach and the Court does not question it.

[124] The Court does respect the decision made by the defence to prioritize fairness of the trial for Corporal Zapata-Valles over his right to be tried within a reasonable time, and it does not question in any way the professional or ethical conduct on the part of defence counsel, as it does not see anything of concern for the Court to consider on this topic, and as it is not its role to proceed with a review on anything of that nature in the circumstances.

[125] However, it is the consequences on the delay coming from such an approach by the defence that the Court is entitled to consider. As stated by the Supreme Court of Canada in *Cody* at paragraphs 34 and 35:

> [34] This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count toward the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time — and the need to balance both — in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.
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> [35] We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. All justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(*b*) of the *Charter*.

[126] For the Court, a balanced approach in the circumstances, especially considering the impact the request for an adjournment could have on delaying the proceedings, should have been taken by the defence. To the contrary, it decided to formally reiterate its request for an adjournment, despite the prior decision made by the Court, which resulted in impacting on the duration of the cross-examination of the complainant. Such conduct, in the circumstances, shall be considered illegitimate as it caused, by its sole action, a delay that ultimately, must count against the *Jordan* ceiling.

[127] Second, the applicant sought the production of a claim filed by the complainant with the CAF - DND Sexual Misconduct Class Action Settlement. This matter was raised with the Court by the applicant at the end of the sixth day of the cross-examination of the complainant.

[128] The defence committed to file an application regarding a request to disclose a document as defined at section 278.1 of the *Criminal Code* on the morning after. However, during a conference call I held on that morning with both parties because it had not filed yet the necessary notice in writing, defence counsel humbly recognized that the task of preparing such a notice in

writing was greater than he thought. Consequently, he requested and obtained an additional 24 hours to file the motion in question.

[129] The defence filed his notice in writing for disclosure with the prosecution and the Court on the morning after, and I proceeded with the hearing on this request in the afternoon. Finally, the next morning I provided my decision and dismissed the application from Corporal Zapata-Valles to hold a hearing to determine if disclosure of the document should be ordered as it had no reasonable prospect of success in the circumstances.

[130] I concluded in that way for two reasons: first, there was no factual basis for concluding that such a document would be relevant; second, there was no factual basis for the Court to consider that Corporal Zapata-Valles may succeed in establishing an air of reality concerning a defence of motive to fabricate, which would lead to the disclosure of this third-party record without specific relevance to an issue at trial.

[131] This matter of disclosure could have been dealt with in a different manner by the defence. As a matter of fact, such an application could have been considered by this Court prior to the commencement of the trial, as it raised a specific concern regarding the access to a document allegedly held by a third party. As long as the relevancy to obtain the information is established before the Court, then proper consideration can be given to the disclosure of it by the Court.

[132] By addressing this issue in the course of the cross-examination of the complainant and during the period of time set for the trial itself, the defence did not give full consideration to the proper time for dealing with this matter. In addition, it never informed the prosecution and the Court about its intent to raise such a question prior to raising it in the course of the trial, thus depriving the Court of the opportunity to deal with this issue at a more convenient time.

[133] Again, such conduct, in the circumstances, shall be considered illegitimate as the defence caused, by its sole action, a delay that ultimately, must count against the *Jordan* ceiling.

[134] These two events occurred on the sole initiative of the applicant and needed three different days, in part or in full, to be dealt with over this period of ten days during which the entire testimony of the complainant lasted.

[135] They also made the testimony of the complainant last longer to the point that the prosecution, despite its best effort, could not complete the presentation of its case within the first week of the trial as planned, nor it was able to conclude it after the two weeks scheduled for the completion of the entire trial.

[136] These events resulted in a situation where the trial had to be adjourned at the request of the prosecution, being in a situation where it had not completed the presentation of its case, having at least three other witnesses to call.

[137] The end date for the presumptive ceiling of eighteen months (548 days) being on 30 October 2021, then the Court and the prosecution both indicated that they could make themselves available during the month of August or October 2021 to complete the trial.

[138] However, the defence counsel told the Court that his first availability on his agenda would be in April 2022, which is after the end date for the presumptive ceiling of eighteen months for considering if there is any violation of the constitutional right of his client to be tried within a reasonable time. He mentioned the possibility for him to proceed sooner in January 2022 or even in September 2021 if there is any change to his schedule and committed to notify the Court if there is any change to his availability.

[139] The Court never received any notification from the defence counsel for any change to his agenda that would have allowed the Court to proceed with the remainder of this trial sooner than the month of April 2022. In addition, he was informed of the steps taken by the prosecution with this Court to have it continue this case as early as January 2022, because of the withdrawal of charges against an accused he represented and for which the trial was set for that timeframe. He never commented on the request made by the prosecution or commented on the Court's response indicating that the Deputy Director of Prosecutions Services made the decision to proceed with another ongoing trial during that timeframe.

[140] It is one of these situations identified in *Jordan* where while the Court and the prosecution are ready to proceed in a way to give full meaning to the accused's constitutional right to be tried within a reasonable time, and the defence is not, then the period of delay resulting from that unavailability is attributed to the defence. This conclusion is the same as the one I made regarding the reasons for adjourning this trial for the very first time.

[141] I concluded that the trial had to be adjourned for the first time because of the sole actions of the defence. Then, I came to the same conclusion for this second time as well that this trial had to be adjourned, meaning that such postponement and continuation of the trial at a later date in 2022 was the result of the sole actions of the defence.

[142] It is my conclusion that the delay of 273 days (nine months), being the result of moving the anticipated end of the trial from 16 July 2021 to 15 April 2022, was caused by the sole and illegitimate conduct of the applicant and shall be deducted from the total delay of 680 days previously determined.

Conclusion

[143] Accordingly, the total net delay being now 407 days (13 months and 11 days), which is below the relevant ceiling, then the defence must demonstrate that the delay was nonetheless unreasonable to demonstrate a paragraph 11(*b*) *Charter* violation.

[144] Such situation was never claimed by the applicant and no evidence has been adduced by him to this effect.

[145] Essentially, this final result reflects the principle which has governed the approach taken by the defence counsel in this case, which is to defend his client by all authorized means as long as it provides him with a fair trial. However, such an approach must be balanced and

consideration shall be given to the duration of the trial, as it is also a concern with respect to the fairness to be given to the trial.

FOR ALL THESE REASONS, I:

[146] **DISMISS** the application made by Corporal Zapata-Valles.

[147] **DECLARE** that the right of Corporal Zapata-Valles under paragraph 11(*b*) of the *Charter* to be tried within a reasonable time on the charge in the charge sheet has not been violated.

"L.-V. d'Auteuil, Lieutenant-Colonel"
Acting Chief Military Judge

Counsel:

Captain D. Sommers, Defence Counsel Services, Counsel for the Applicant, Corporal A.A. Zapata-Valles

The Director of Military Prosecutions as represented by Major A. Dhillon, Counsel for the Respondent