HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. Michalopoulos*, 2025 CM 6005

Date: 20250911
Docket: 202517

Preliminary Proceedings

8 Wing Trenton
Trenton, Ontario, Canada

Between:

Corporal J. Michalopoulos, Applicant

- and -

His Majesty the King, Respondent

Before: Colonel N.K. Isenor, M.J.

DECISION CONCERNING AN APPLICATION UNDER SUBSECTION 24 (1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ALLEGED VIOLATION OF SECTION 7 OF THAT SAME CHARTER FOR LATE AND/OR OUTSTANDING MATERIAL DISCLOSURE

(Orally)

I. Introduction

[1] The accused, Corporal (Cpl) Michalopoulos, is being tried for having allegedly committed fraud-related offences in relation to making false entries on the Canadian Armed Forces (CAF) Brookfield Global Relocation Services (BGRS) member secure website and fraudulently claiming expenses related to moves between Trenton, Ontario (ON), and Bagotville, Québec (QC) to which he was not entitled. By virtue of his amended notice of application dated 8 September 2025, Cpl Michalopoulos alleges that his right to make full answer and defence under section 7 of The *Canadian Charter of Rights and Freedoms* (*Charter*) has been breached by the prosecution providing late disclosure and/or failing to provide outstanding material disclosure, most specifically

information regarding Major (Maj) retired (Ret'd) Sanfacon, a key witness for the prosecution.

[2] The applicant seeks remedies under subsection 24(1) of the *Charter* namely to: grant an adjournment of the court martial currently scheduled to convene on 8 September 2025; direct the prosecution to confirm whether the investigation is complete; order the production of all outstanding disclosure; allow reasonable time for the applicant to review all disclosure and take any subsequent steps necessary, including bringing additional applications, if warranted; grant an order excluding the prosecution from leading the evidence of Maj (Ret'd) Sanfacon; grant the applicant the right to be reinstated to the position he held prior to this re-election with respect to the mode of trial; and to fix a new trial date that ensures the applicant's right to make full answer and defence is preserved.

II. Facts

[3] On 14 September 2023, the police began investigating the allegations against Cpl Michalopoulos. On 7 May 2024, the applicant was charged with three charges (one charge contrary to section 130 of the *National Defence Act* (*NDA*), that is to say, fraud, contrary to section 380 of the *Criminal Code*; one charge contrary to section 130 of the *NDA*, that is to say, attempt fraud, contrary to section 463 of the *Criminal Code*; and one charge contrary to section 125 of the *NDA*, willfully made a false statement in a document made by him that was required for official purposes); and on 21 June 2024, the charges were preferred.

[4] On 22 May 2024, defence counsel submitted a written disclosure request.

[5] On 14 June 2024, the prosecution provided approximately 428 pages of disclosure, and on 21 June 2024, advised defence counsel that all the disclosure in the possession of the prosecution had been provided to the applicant.

[6] The initial disclosure package contained page 239 which outlined that Maj (Ret'd) Sanfacon was questioned by police about the applicant's children, where they were living and whether they were physically with the applicant during his moves. Page 239 also outlined that Maj (Ret'd) Sanfacon mentioned she consulted her personal calendar to check the dates to inform her answer about the children's location.

[7] On 13 August 2024, the first supplemental disclosure of approximately thirty-two pages appears to have been released to the prosecution.

[8] On 19 September 2024, a scheduling conference took place, and a General Court Martial was set for 8 September 2025.

[9] On 17 October 2024, carriage of the prosecution file was transferred from Maj Dhillon to Maj Ferron.

[10] On 12 December 2024, the first supplemental disclosure was provided to the applicant.

[11] On 17 April 2025, defence counsel was advised by the prosecutor Maj Ferron via telephone that he had submitted an additional disclosure request and was expecting to receive further materials.

[12] On 29 May 2025, carriage of the prosecution file was transferred from Maj Ferron to Maj Moffat.

[13] On 19 June 2025, Sergeant Martin, court reporter, sent an email to counsel requesting a conference call. Later that same day, defence counsel sent an email to the prosecution requesting forty-four items of disclosure, including the disclosure previously mentioned by Maj Ferron.

[14] On 9 July 2025, the first pre-trial conference call was held with counsel who advised that defence counsel had recently requested significant further disclosure and that the prosecution was actively working on actioning the request and expected to be able to provide the disclosure over the next few weeks. Defence counsel also advised that they were considering making an application for further particulars and the possibility of an application for disclosure. Counsel agreed to discuss the matter separately to see if this issue could be resolved without the need to make an application, and tentative dates for hearing possible applications were discussed, identifying 30 July to 1 August 2025 as dates to hear a potential *O'Connor* application, as well as set placeholders in the judicial calendar for the potential applications regarding further disclosure and further particulars being contemplated by defence counsel.

[15] Between 18 to 30 July 2025, the prosecution provided the applicant with over 1,250 pages of disclosure.

[16] The disclosure package provided in July 2025 included page S2-296 which outlined that on 12 May 2025, the military police called Maj (Ret'd) Sanfacon to confirm whether she still had a copy on her cell phone of the calendar she had consulted during the first interview with military police. This disclosure package also included the contents of what Maj (Ret'd) Sanfacon provided to military police including an attachment with calendar dates as well as screen shots of text messages between herself and Cpl Michalopoulos.

[17] On 21 July 2025, a second pre-trial conference call was held with counsel where it was confirmed that disclosure was currently being provided to defence counsel and defence counsel indicated that they needed the rest of the week to review the approximately 517 pages of disclosure received on 18 July 2025, to be able to confirm whether disclosure had been completed. Defence counsel advised that they were still contemplating making applications for further disclosure, as well as for further particulars. The prosecution advised that regarding further particulars, he was working with defence counsel and was considering either drafting a new charge sheet or a list of

all evidence that the prosecution intended to produce to assist defence counsel. The prosecution further advised that he was considering making an application for a preliminary ruling on an *O'Connor* application.

[18] On 22 July 2025, the prosecution filed an application for a preliminary ruling regarding an *O'Connor* application.

[19] On 25 July 2025, the third pre-trial conference call was held with counsel where defence counsel advised that significant disclosure had been received, however, were still awaiting some audio files and the prosecution advised that of the items that actually existed on the forty-four item list, there were only a few remaining items left for prosecution to disclose and he expected them to be disclosed imminently. The prosecution confirmed that they would provide an item-by-item breakdown for clarity regarding the forty-four items. With respect to defence's request for further particulars, the prosecution advised that they intended to particularize the charges in an email he intended to send to defence counsel. Regarding the *O'Connor* application, counsel agreed that they would have separate discussions to see if this issue could be resolved without the need for the application to be heard, and as such, no date was set to hear the application.

[20] On 29 July 2025, the prosecution received a line-by-line response to the forty-four item disclosure list from the military police. On 30 July 2025, the prosecution sent the line-by-line response to defence counsel.

[21] Of the forty-four items of disclosure requested, thirty-eight items had been referenced in the initial disclosure sent on 19 June 2024. Of the thirty-eight items, five were items already provided in the initial disclosure on 19 June 2024, and nine items were for recordings that were never made. The remaining six items on the list were items that did not reference specific pages of the initial disclosure.

[22] On 29 July 2025, the prosecution filed a notice of withdrawal of their application for a preliminary ruling regarding an *O'Connor* application.

[23] On 29 July 2025, defence counsel filed an application for further particulars.

[24] On 29 July 2025, the fourth pre-trial conference call was held with counsel where defence counsel advised that there were still some items outstanding from their list of forty-four items requested, and the prosecution confirmed that they expected to complete disclosure the next day. During this call, the date of 31 July 2025 was confirmed to hear the application.

[25] On 30 July 2025, defence counsel withdrew their application for further particulars.

[26] On 7 August 2025, the military police again called Maj (Ret'd) Sanfacon to confirm the details of the children's whereabouts, the custody agreement and if the children were with the applicant when he moved.

[27] On 7 August 2025, the applicant re-elected to Standing Court Martial (SCM).

[28] On 11 August 2025, the Court Martial Administrator (CMA) issued a new convening order outlining that Cpl Michalopoulos would be tried by SCM on 8 September 2025.

[29] On 26 August 2025, a fifth pre-trial conference call was held with counsel where defence counsel advised that a few disclosure items remained outstanding, and that they were still considering an application for disclosure. The prosecution, who had just returned from two weeks of leave, undertook to follow up with the military police.

[30] On 29 August 2025, the prosecution provided approximately fifty pages of further disclosure, described as "multiple email chains, mortgage port paperwork, DND2869 and an updated GO report". The updated GO report included details regarding the 7 August 2025, phone call to Maj (Ret'd) Sanfacon from the military police but did not include the audio recording of the phone call. This disclosure package also included reference to the fact that the evidence was released to the prosecution on 8 August 2025. Pages S2-1146 to S2-1160 were also missing from the disclosure package.

[31] On 3 September 2025, the prosecution provided a response to disclosure item number 44 from the list of disclosure items requested by the applicant on 19 June 2025, confirming that the *McNeil* reports for the military police involved in the investigation did not uncover any police misconduct.

[32] On 3 September 2025, the applicant emailed the prosecution with a list of eight items that he considered remaining outstanding.

[33] On 3 September 2025, the prosecution withdrew the original charge sheet dated 21 June 2024, and substituted it with a new charge sheet maintaining the exact particulars of two of the original charges (one charge contrary to section 130 of the *NDA*, that is to say, fraud, contrary to section 380 of the *Criminal Code*; and one charge contrary to section 125 of the *NDA*, willfully made a false statement in a document made by him that was required for official purposes). The charge contrary to section 130 of the *NDA*, that is to say, attempt fraud, contrary to section 463 of the *Criminal Code*; was no longer being pursued by the prosecution. The withdrawal of the charge sheet, and the substitution of the new charge sheet created the additional requirement of needing the applicant to once again elect his mode of trial.

[34] On 3 September 2025, the applicant again elected to be tried by SCM. As a result of the new charge sheet, a new convening order was issued by the CMA the same day, keeping the original trial date, place and time.

[35] On 4 September 2025, the prosecution replied to the applicant's email of 3 September 2025 regarding outstanding disclosure, indicating that he was endeavouring to provide clearer images of one disclosure item requested (text messages provided to the military police by Maj (Ret'd) Sanfacon) and would look into the balance of the items referenced.

[36] On 4 September 2025, the accused filed a notice of application alleging a breach of his section 7 *Charter* right to make full answer and defence based on late and/or outstanding disclosure.

[37] On 5 September 2025, the prosecution provided the applicant with seventy-four pages of supplemental disclosure, including the missing pages S2-1146 to S2-1160.

[38] On 5 September 2025, a sixth pre-trial conference call was held with counsel where it was determined that the audio recording from Maj (Ret'd) Sanfacon's call with the military police on 7 August 2025 remained outstanding and may be lost evidence. Defence counsel indicated that they had just received additional items of disclosure related to their 4 September 2025 request for disclosure and would require time to review and amend their application for disclosure.

[39] During that conference call, the prosecution was directed to respond to the application in writing no later than 6 September 2025, and the applicant received permission from me as the military judge to file an amended notice of application by close of business on 8 September 2025. I further declared that I would delay the commencement of proceedings of the SCM to allow the application regarding further particulars to be heard at 8 Wing Trenton on 10 September 2025. Defence counsel advised that they were considering making an application for lost evidence, and I directed that should defence counsel choose to pursue that application, that the notice of application be filed no later than noon on 9 September, with counsel being prepared to argue the application at 8 Wing Trenton on 10 September 2025, following the hearing of the application regarding further disclosure.

[40] On 8 September 2025, the prosecution provided the applicant with the audio recording of the 7 August 2025 phone call between Maj (Ret'd) Sanfacon and the military police.

[41] During oral submissions, counsel for the applicant provided an update to the court and indicated that no items of disclosure were outstanding. Of the further disclosure expected by defence that was listed in their notice of application, they had either received the disclosure or received confirmation from the respondent that the requested disclosure either did not exist or that the respondent did not possess the requested disclosure. The applicant also advised that he was no longer seeking the remedy of being granted the right to be reinstated to the position he held prior to his re-election with respect to the mode of trial.

III. Evidence

[42] The applicant filed a notice of application dated 4 September 2025, an amended notice of application dated 8 September 2025, an affidavit of Phyllis Nadeau dated 4 September 2025, containing Exhibits A to Q, as well as separate Exhibits R to V as evidence in support of his application. The respondent filed a response dated 6 September 2025, as well as an affidavit of Brittney Pregent, containing Exhibits R1 to R10 dated 8 September 2025, as evidence in support of his response.

IV. Has the applicant established on a balance of probabilities that the respondent breached their duty of disclosure, and if so, did this breach amount to a violation of the applicant's section 7 *Charter* right to make a full answer and defence? If the breach amounted to a violation of the applicant's section 7 *Charter* right, what is the appropriate remedy for this breach?

Positions of parties

The applicant

[43] The applicant in this matter takes the position that the timing of the disclosure is a key factor that directly affected the applicant's ability to make full answer and defence. The applicant points to two aspects of the timing that both had an impact. First, the sheer volume of disclosure of 1,250 pages received between 18 and 30 July 2025, with an additional 124 pages in the week leading up to the trial directly impacted the applicant's ability to make full answer and defence. Second, the applicant emphasizes the receipt on 8 September 2025, which was the forecasted first day of trial, of an audio recording of a key witness that was previously thought lost, as a critical example of the late evidence received, making it impossible for the applicant to effectively prepare for the trial, thus breaching the applicant's section 7 *Charter* right. The applicant indicates that he requires time to reorganize, digest and chronologize the documents and strategy.

[44] The applicant further argues that he lost approximately ten days of net prep time due to constitutional litigation, and this, together with a notice of application for further particulars that was made and subsequently withdrawn by the applicant, consumed much of the applicant's available time to prepare and strategize for trial. Counsel for the applicant also pointed out that he was involved with the defence of another matter during the July and August 2025 timeframe that also required his attention. The applicant did acknowledge, however, that these applications did result in the receipt of a revised charge sheet and clarity on the focus of the two charges before the Court.

[45] With respect to the prejudice caused by the late disclosure, the applicant indicated he was not focusing on the evidence of a single witness, Major (Ret'd) Sanfacon, to which the 7 August 2025, audio recording related but on the entirety of the evidence that simply arrived too late to be marshalled. However, the applicant points to the *R. v. Lyttle*, [2004] 1 S.C.R. 193 case and submits that the ability of the accused to properly prepare for, and cross-examine a potential witness is fundamental to the accused's right to make full answer and defence. As such, despite the fact that the

applicant had received notes outlining what Maj (Ret'd) Sanfacon's evidence would entail, the applicant views the 7 August 2025, audio recording as fresh evidence as this was the first time the applicant had received disclosure outlining the witness's expected testimony in her own words. The applicant argues that the notes summarizing the call are not sufficient to allow the defence to adequately prepare for the cross-examination of Maj (Ret'd) Sanfacon, and the late receipt of the audio recording is critical to his ability to accurately prepare for, and cross-examine this witness.

[46] In terms of a remedy, the applicant presented two options, preferring the first. The applicant suggests that a five-week adjournment to 20 October 2025 in this case would be appropriate, still allowing time to complete the trial prior to the *Jordan* ceiling forecasted for 7 November 2025 (see *R. v. Jordan*, 2016 SCC 27). Defence explained that a minimum of two weeks are required to reorganize the disclosure received and develop a coherent trial strategy, and consider or draft further *Charter* applications if required. The applicant indicated that he would require two further weeks as co-counsel will be posted at the end of September 2025, and he would need time to assume full conduct of the file. As an alternative option, the applicant indicated that the Court could consider excluding Maj (Ret'd) Sanfacon's evidence, in which case the defence could be ready on 29 September 2025, to commence proceedings. The applicant argues that either option avoids triggering any subsection 11(b) *Charter* concerns and the adjournment would stop the impact of the late disclosure on the applicant's right to make full answer and defence and cure the breach. The applicant concluded by indicating that the late and disorganized provision of 1,250 pages of disclosure with disjointed sequencing and numbering negatively impacted the applicant's ability to prepare, and was duplicative, excessive, and ultimately impacted his section 7 *Charter* right.

The respondent

[47] The respondent concedes that providing the audio recording of a witness on the morning of the date that the trial was scheduled to commence merits an adjournment. However, the respondent is of the view that the adjournment was already provided by the military judge, when they directed on 5 September 2025, that the application regarding the late disclosure would be heard on 10 September 2025. The respondent further agrees that the best evidence rule applies and that the recording should have been disclosed with the notes of the 7 August 2025, telephone call with Maj (Ret'd) Sanfacon.

[48] The respondent also concedes that the voluminous, and sometimes late disclosure was not ideal, and did create more work for the applicant. The respondent indicated that he diligently worked to provide disclosure and to respond to each query that the applicant made for disclosure. However, prosecution counsel changed twice during the pre-trial period, and there was also a change of the evidence custodian handling the disclosure which also caused some disclosure to be provided inefficiently and likely with multiple unnecessary copies. The respondent was unable to provide exact specifics regarding approximately 760 pages of the 1,250 pages of disclosure that

had been sent to the applicant in July 2025, however, was of the view that the disclosure did not contain new information and was likely largely redundant.

[49] Despite the inefficient way disclosure was completed in July 2025, the respondent strongly disagrees with the remedies requested by with the applicant's contention that his section 7 *Charter* rights were breached by the timing and method of disclosure. The respondent points to the fact that approximately 490 pages of disclosure were provided between June and December of 2024, and this disclosure represents the vast majority of relevant disclosure in this case. He argues that the information contained in that disclosure provides all the information and detail required to fully inform the applicant regarding the case to be met, and that the applicant had been in possession of the majority of the information since June 2024. The respondent maintained that the scope of the prosecution's case pertains to the alleged fraudulent claims and associated false entries related to mortgage penalty fees, a moving company claim, and claiming expenses for dependents for which the applicant was not entitled to, and that these allegations, along with the relevant disclosure outlining the evidence supporting the allegations have been resident in the disclosure all along.

[50] Specifically with respect to the call with Maj (Ret'd) Sanfacon on 7 August 2025, the respondent maintains that the call did not represent a new investigative step, no new information gained during the call, and that the military police merely contacted the witness to verify whether they still recalled the dates in question and still had access to the personal calendar that they consulted during the original interview with the military police. As such, the relevant information regarding the case to be met, and what information the witness could be expected to provide had been in the possession of the applicant for months. Specifically, as it relates to screen shots of the calendar and text messages, the respondent indicated that these were disclosed in July 2025. However the information contained in the screenshots was also known to the applicant for some time.

[51] It is the respondent's submission that the applicant had all the requisite information required to fully understand the case to be met since June 2024, and although some of the disclosure was produced inefficiently, and some was disclosed late, this does not constitute a breach of the applicant's section 7 *Charter* right, as the applicant is fully able to make full answer and defence. The respondent submits that it may be the case that the applicant has been busy and has not had time to properly prepare for the trial, and therefore needs an adjournment, however, in his view, any adjournment cannot credibly be attributable to a breach of the applicant's section 7 *Charter* rights.

[52] Specifically with regard to remedy, the respondent argues that the applicant has not provided any basis for his suggestion of an alternate remedy of an exclusion of evidence and an adjournment to 29 September 2025. He argues that the case law provided for the possibility of the court to be creative in crafting remedies. However exclusion is an extreme remedy to be used as a last resort in the most exceptional cases, and is not appropriate in this case. He further argues that the late disclosure of an audio recording of a fifteen-minute phone call simply does not warrant a two-week

adjournment, and certainly not a five-week adjournment, which was the other remedy suggested by the applicant. The respondent is also of the view that if the applicant requires a two-week adjournment due to a change of counsel, this delay should be attributed to the applicant, as it is in no way related to the late disclosure in this case. The respondent is of the view that the adjournment was already provided by the military judge when they directed on 5 September 2025, that the application regarding the late disclosure would be heard on 10 September 2025.

Applicable law

[53] In the case at hand, the applicant bears the burden of demonstrating, on a balance of probabilities, that the right to make full answer and defence has been violated. See *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paragraphs 20to 24, and 26 to 27.

Constitutional right to receive full disclosure

[54] An analysis of an application relating to a breach of this *Charter* right for providing late disclosure involves a three-step process: first, whether there was a breach of disclosure; second, if there was a breach of disclosure, whether there was a violation of the right to make full answer and defence; and finally, if there was such a violation, the appropriate remedy that the Court should impose.

[55] There is an ongoing obligation on the prosecution to disclose, and it must disclose any new information or material to the defence as soon as possession or control of the records is obtained. The obligation to disclose exists whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. *R. v. Stinchcombe,* [1991] 3 S.C.R. 326 confirmed the common law right of an accused to receive full disclosure of evidence was a guaranteed right under section 7 of the *Charter* as one of the principles of fundamental justice.

Right to make full answer and defence

[56] The right of the accused to disclosure of information exists whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. This right is protected under section 7 of the *Charter* and helps to guarantee the accused's ability to exercise the right to make full answer and defence as this was recognized at paragraph 37 of the decision by the Supreme court of Canada in *R. v. Carosella*, [1997] 1 S.C.R. 80:

> [37] The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer C.J. in *Tran*, the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24 (1) of the *Charter.*

Threshold for exclusion orders

[57] With respect to a case where an accused seeks an exclusion order as a result of alleged late disclosure by the Crown, in *Bjelland* at paragraph 24, Rothstein J. states:

> [24] Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate and just to exclude evidence under s. 24(1).

V. Analysis

[58] The respondent readily admits that the prosecution breached their duty of disclosure owed to the applicant by providing an audio recording of a 7 August 2025 call to Maj (Ret'd) Sanfacon to the applicant on the morning of what should have been the commencement of proceedings with respect to Cpl Michalopoulos. As such, the Court has no problem finding that there was a breach of the duty of disclosure owed to the applicant by the late disclosure of the audio recording.

[59] The respondent further admits that the voluminous and sometimes redundant format of the disclosure was not ideal and created difficulties for the applicant, but denies that the applicant suffered a section 7 *Charter* breach as a result of this disclosure. On this point, the Court does not find that the provision of the voluminous and sometimes redundant format of the disclosure constitutes a breach of the duty of disclosure. With respect to the material disclosure, I find that the applicant was in possession of the information required in order to understand and meet the case against him since at least December 2024. As such, although the voluminous and inefficient disclosure that arrived in July 2025 may have caused the applicant to waste valuable preparation time, it did not prevent the applicant from being able to make full answer and defence.

[60] The applicant had many months available to him to prepare his defence where he possessed the majority of the information relevant to the charges against him. The evidence before the court further establishes that by 18 July 2025, the applicant had received over 500 pages of the July 2025 disclosure, and the full 1,250 pages by 30 July 2025. Although not ideal due to some of its redundant nature, the applicant had somewhere between six weeks and a month, with the benefit of two defence counsel available to review, sequence and absorb the majority of the material, and more than a week to review the remaining 124 pages received.

[61] The next step in the analysis requires that the court determine whether that breach of disclosure resulted in a violation of the applicant's right to make full answer

and defence, such that a remedy under subsection 24(1) of the *Charter* is warranted. In order to make this determination, in the case at hand, the court must determine whether the late disclosure of the audio recording prevented the applicant from being able to make full answer and defence.

[62] With respect to the late provision of the audio recording, I find that the applicant's section 7 *Charter* right was violated. It is clear that the applicant was entitled to disclosure of the audio recording in a timely way, and that did not occur. However, in so far as it pertains to an appropriate remedy under subsection 24(1) of the *Charter*, the evidence before the court clearly establishes that the information relevant to the evidence that the prosecution intends to produce through Maj (Ret'd) Sanfacon's testimony was disclosed to the applicant in June 2024, thereby permitting the applicant many months to prepare to make full answer and defence. Having said this, it is foreseeable that the applicant may want to utilize the information the audio recording contains in the cross-examination of Maj (Ret'd) Sanfacon, particularly as it pertains to any inconsistencies that may be uncovered.

[63] As such, the best evidence rule indeed applies, and the Court has no problem finding that the applicant was entitled to the timely disclosure of this audio recording, as well as a short adjournment to assess and adjust his defence strategy if warranted. In a case such as this, the Court is permitted flexibility to find creative solutions to address a breach of disclosure, even when it does not result in significant prejudice to the accused.

[64] Although the adjournment that was granted by the Court to at least 12 September 2025, was meant to allow for the hearing of this application, as well as to allow the applicant time to prepare a lost evidence application, once it was discovered that the audio recording was not lost, the additional time granted by the adjournment then became available to the applicant to use to address any unfairness caused by the late disclosure of the audio recording. At a minimum, this would have created some time for the applicant to continue his assessment of the audio recording for the purpose of cross-examining the witness.

[65] Further, in this case, the Court is also prepared to grant the applicant some flexibility as it pertains to the timing of his cross-examination of Maj (Ret'd) Sanfacon, by allowing the applicant to cross-examine Maj (Ret'd) Sanfacon at the end of the prosecution's evidence, regardless of when in the proceeding she is called as a witness, should the applicant choose to do so. This will allow the applicant additional time to prepare his cross-examination of the witness, as well as to adjust his trial strategy should he wish to. This remedy is quite apart from the conduct of the prosecution's case. As always, the prosecution is fully entitled to call his evidence and witnesses in whatever order he prefers.

[66] The Court is of the view that neither of the applicant's proposed remedies are appropriate in the circumstances of this case. With respect to the proposed remedy of an adjournment of five weeks to allow the applicant time to address any unfairness created by the late disclosure of a fifteen-minute audio file, the Court finds this remedy

excessive and unnecessary and contrary to the maintenance of the integrity of the military justice system. This is particularly so, as the applicant had been in the possession for months of the relevant information regarding the case to be met, and what information the witness, Maj (Ret'd) Sanfacon, could be expected to provide. The Court is also of the view that any delay created by an adjournment that is required due to the change of defence counsel would be attributable to the defence. The Court does not accept the argument advanced by the applicant that this particular delay should be attributable to the respondent because the root cause of the delay can be traced back to the breach of disclosure.

[67] Equally, the Court is of the view that the alternate remedy of an exclusion of Maj (Ret'd) Sanfacon's evidence and a two-week adjournment proposed by the applicant is also not appropriate in this case. Given the fact that the applicant was in possession of the relevant information to which the 7 August 2025 telephone call pertained, it cannot be said that the late disclosure rendered the trial process unfair nor that any unfairness arising could not be remedied through an adjournment and disclosure order, and neither was an exclusion necessary to maintain the integrity of the justice system. The court has already found that the adjournment of the commencement of the trial to have provided sufficient time to the applicant to address the breach. As such, an exclusion order does not apply.

[68] With respect to other remedies requested by the applicant, the Court notes that the prosecution confirmed in their response filed as evidence that the investigation is complete. Further, the applicant confirmed on the record that no other disclosure was outstanding.

[69] It is important to make a few observations about the conduct of the case. There is no assertion that the prosecution attempted to hide any evidence. Immediately upon the missed disclosure evidence of the audio recording coming to its attention, the prosecution communicated that information to defence counsel and endeavoured to have it disclosed as soon as possible. However, the facts speak for themselves. It is clear on the evidentiary record that on more than one occasion, relevant evidence owed to the applicant sat in the possession of the prosecution for extended periods of time. When queried by the Court, the respondent was unable to provide an explanation for the majority of these gaps. It goes without saying that the prosecution has an ongoing obligation to an accused to provide timely disclosure of all relevant information. To not do so risks undermining the integrity of the military justice system and it is clear in this case that a higher standard of timeliness could have been achieved.

VI. Conclusion

[70] I find that the applicant's right guaranteed under section 7 of the *Charter*, as it related to his right to make full answer and defence by receiving full and timely disclosure, has been infringed. As conceded by the respondent, the applicant received disclosure of an audio recording of a key witness on the day that the trial was to commence, thereby breaching his duty of disclosure. The short adjournment already

granted by delaying the commencement of proceedings from 8 September 2025 until 12 September 2025, combined with granting the applicant some flexibility as it pertains to the timing of his cross-examination of Maj (Ret'd) Sanfacon, by allowing the applicant to delay his cross-examination of Maj (Ret'd) Sanfacon to the end of the prosecution's evidence, regardless of when in the proceeding she is called as a witness, should the applicant choose to do so will sufficiently remedy any unfairness created by the late disclosure.

FOR THESE REASONS, THE COURT:

[71] **CONCLUDES** that the prosecution did violate the applicant's section 7 *Charter* right to make full answer and defence.

[72] **GRANTS** in part the application by delaying the commencement of proceedings from 8 September 2025 until 12 September 2025, combined with granting the applicant some flexibility as it pertains to the timing of his cross-examination of Maj (Ret'd) Sanfacon, by allowing the applicant to delay his cross-examination of Maj (Ret'd) Sanfacon to the end of the prosecution's evidence, regardless of when in the proceeding she is called as a witness, should the applicant choose to do.

Counsel:

Major C.M. Da Cruz and Major E.L. Rioux, Defence Counsel Services, Counsel for Corporal J. Michalopoulos, Applicant

The Director of Military Prosecutions as represented by Major D.G. Moffat and Major L.J.G. Carignan, Counsel for the Respondent