Citation: *R. v. Master Corporal J.E.M. Lelièvre,* 2007 CM 1012

Docket: 2006104

STANDING COURT MARTIAL
CANADIAN ELEMENT OF THE NATO AIRBORNE EARLY WARNING FORCE
GEILENKIRCHEN
GERMANY

Date : May 25, 2007

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL J.E.M. LELIÈVRE
(Accused-applicant)

DECISION RELATING TO AN APPLICATION UNDER PARAGRAPH 112.05(5)(e) OF THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES IN RELATION TO A VIOLATION OF SECTION 11(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Delivered from the bench)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] This is the decision of the Court on the application made by the defence under subparagraph 112.05(5)(*e*) of the Queen's Regulations and Orders for the Canadian Forces [QR&O] for a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms* [the Charter] on the ground of an alleged violation of the right of the accused to be tried within a reasonable time, under section 11(*b*) of the Charter.

EVIDENCE

[2] The evidence before the Court is as follows:

First, matters within judicial notice, under section 15 of the Military Rules of Evidence; and

Second, exhibits produced to the judge presiding at the motion on the consent of counsel and solely for the purposes stated in the consent of counsel:

a. Exhibit R1-1 (Joint Statement of Facts);

b. Exhibit R1-2 (Record of disciplinary proceedings dated February 2, 2006, signed by Chief Warrant Officer J. Bourdon);

c. Exhibits R1-3 and R1-4 (A series of e-mails between November 10 and 30, 2005, involving Master Corporal Lelièvre's commanding officer, Lieutenant-Colonel J.J.A.M. Cournoyer, and officers at National Defence Headquarters, Ottawa, relating to the status of the anticipated promotion of Master Corporal Lelièvre to the rank of sergeant, scheduled for December 1, 2005, following the incidents of November 4, 2005);

d. Exhibit R1-5 (A message, R 280743Z SEP 05, relating to the promotion of Master Corporal Lelièvre to the rank of sergeant on December 1, 2005);

e. Exhibit R1-6 (A letter dated January 10, 2006, signed by Major C. Bélanger of Military Careers at NDHQ confirming that Master Corporal Lelièvre's career was undergoing administrative review and was at the disclosure stage);

f. Exhibit R1-7 An excerpt from the pay rate applicable to non-commissioned officers of the regular forces dated May 18, 2005, and calculation of the potential difference in Master Corporal Lelièvre's pay if he had been promoted to the rank of sergeant on December 1, 2005);

g. Exhibit R1-8 (Copy of chapter 11 of Volume I of the QR&O entitled “Promotion, Reversion and Compulsory Remustering”);

h. Exhibit R1-9 (Copy of an articled published in June 2006 in the Canadian local military newspaper “The Maple Leaf”, written by Master Corporal Lelièvre, entitled “Drinking and driving (Historical)”);

i. Exhibit R1-10 (A series of e-mails between Ms. M. Springer, liaison officer in the office of the Assistant Judge Advocate General (Europe) in Geilenkirchen, Germany, and Major R. Holman, appellate counsel in Military Prosecutions in Ottawa between June 5, 2006, and December 20, 2006; and

Third, the testimony heard during the hearing of the application, from Master Corporal Lelièvre, Captain S. Cloutier and Chief Warrant Officer J. Bourdon.

FACTS

[3] The statement of the facts relevant to the consideration of this application begins with the arrest of Master Corporal Lelièvre at the wheel of his car, by German police, during the evening of November 4, 2005, at or near Geilenkirchen, for the incident that resulted in the laying of a charge before this Court, which is currently pending; it was filed as Exhibit 2 and signed by Major R. Holman, military prosecutor, and dated November 2, 2006. After Master Corporal Lelièvre was arrested, the German police took him to hospital, where a blood sample was taken from his person, according to the procedure in force. The German police filed their first report the next day. On November 5, 2005, Master Corporal Lelièvre contacted Chief Warrant Officer Bourdon to inform him of the recent events. Chief Warrant Officer Bourdon in turn passed the information up through his chain of command, including Master Corporal Lelièvre commanding officer, Lieutenant-Colonel Cournoyer. Master Corporal Lelièvre was immediately forbidden to fly as an air defence technician and ordered to meet with a doctor and a social worker. A few days later, the flight ban was lifted, when the people consulted had found nothing abnormal about the applicant. According to the applicant, the military police received the police repot from their German colleagues three or four days later, including Master Corporal Lelièvre’s driver’s licence, which had been seized at the time of the arrest. Master Corporal Lelièvre’s driver’s licence was suspended for three months starting from the events that are the subject of the charge. The incident was sufficiently serious in itself, and also because of the negative image it presented in the eyes of Master Corporal Lelièvre’s superiors, that his promotion, which had been announced in September 2005 and was scheduled for December 1, 2005, had to be

reviewed. As shown in Exhibit R1-3 and Exhibit R1-4, the accused's commanding officer asked the authorities at National Defence Headquarters to postpone Master Corporal Lelièvre's promotion until the disciplinary proceedings that were to take place in relation to the drunk driving incident were completed, based on information that had been in the hands of Lieutenant Colonel Cournoyer since November 10, 2005. On November 30, 2005, the accused's commanding officer received confirmation from military authorities in the office of the Director General – Military Careers of verbal authorization to delay Master Corporal Lelièvre's promotion until the disciplinary proceedings and the administrative review of his career had been completed. Chief Warrant Officer Bourdon explained to the Court that Lieutenant-Colonel Cournoyer and himself had first made inquiries of the authorities responsible for this subject regarding the options for Master Corporal Lelièvre's immediate chain of command in terms of the incident in relation to his promotion. He said that they had three options: they could, first, wait for the results of the court martial; second, give a warning to, and exercise close supervision of, Master Corporal Lelièvre; and third, promote him to the rank of sergeant on December 1st as originally scheduled. The first option was chosen because they did not believe they had enough information to give a warning and exercise supervision, while granting the promotion as scheduled would have created an unfavourable impression: someone who had just been arrested while intoxicated would have been seen to be rewarded. In other words, Master Corporal Lelièvre's commanding officer and Chief Warrant Officer Bourdon decided that it was preferable to let the dust settle by delaying Master Corporal Lelièvre's promotion. According to the Chief Warrant Officer, that should have been necessary for three to six months at most. Accordingly, in January 2006, Master Corporal Lelièvre's chain of command learned, from Exhibit R1-6, that the authorities at National Defence Headquarters had initiated a review of his career because of the incident for which he had been charged. According to Chief Warrant Officer Bourdon, that scenario had never been considered or discussed in the discussions among the people responsible for career management and Master Corporal Lelièvre's immediate chain of command.

[4] On February 2, 2006, Chief Warrant Officer Bourdon laid charges against Master Corporal Lelièvre for the incident of November 4, 2005, based on the legal opinion given by Lieutenant-Colonel, Léveillée, AJAG Europe. Those charges were referred to the referral authority on February 17, 2006, who referred them to the Director of Military Prosecutions on April 10, 2006. The Director of Military Prosecutions received the file a week later. On April 28, 3006, the Deputy Director of Military Prosecutions assigned two counsel to the case, including one francophone, Major Cloutier, who was prosecution counsel in the Court Martial of Corporal Deans on May 25, 2004, in Geilenkirchen, for an offence that was the same in all respects. The military prosecutors than asked for full disclosure of the evidence in this case from the Canadian Forces Support Unit Europe. The case was reassigned a few days later to Major Holman and Major McMahon because the accused had requested a trial in French.

[5] On June 5, 2006, Major Holman contacted Ms. Springer, liaison officer in the office of the AJAG Europe, and informed her that he had reviewed the police reports, including the translations of the German police reports relating to the case, and asking for her assistance in questioning potential prosecutions witnesses, which was to take place in June or July 2006. Indeed, Major Holman questioned the witnesses called by the prosecution, including an expert witness, between July 2 and 7, 2006 in Geilenkirchen, with the assistance of Ms. Sprinter as interpreter. On July 20, 2006, Major Holman asked Ms. Springer to organize a conference call with some of the German witnesses, including an expert. At the same time, he informed her that he would be on vacation for the first two weeks of August and that he planned to finalize the file before leaving. In mid-August 2006, some witnesses were not available. The telephone interviews seem to have taken place on or about August 21, 2006. Also in mid-August 2006, Major McMahon, one of the counsel in this case, was transferred to the military prosecutions branch as Regional Prosecutor, Central Region.

[6] It seems that this case remained inactive after that until September 25, 2006, when Major Holman asked Ms. Springer by e-mail to send him her notes from the telephone interviews the month before, as well as certain additional information about the expert witness. She did not reply until October 5, 2006, when she said, and I quote, "I just left you a voice mail. Last night, in going through my basket, I noted your email that I had somehow overlooked before. Please excuse, I will aim to get the file completed and have it to you NLT Monday."

[7] Major Holman contacted Ms. Springer by e-mail on October 17, 2006, acknowledging receipt of the information requested on September 25, 2006. He also asked that she provide him with her personal notes, taken during the interviews with all the other witnesses.

[8] On November 2, 2006, Major Holman questioned the expert witness in a conference call. Ms. Springer was present for the conversation. Also on that date, Major Holman recommended to the Assistant Director of Military Prosecutions that a charge be laid against Master Corporal Lelièvre, as set out in Exhibit 2, the charge. Appended to the charge was a memorandum from Major Holman stating that there had not yet been disclosure of evidence to the defence, because Major Holman had not received Ms. Springer's notes about the interviews in July 2006. On November 6, the Assistant Director of Military Prosecutions announced the charge by letter to the Administrator of the Court Martial stating, and I quote, [TRANSLATION] "The prosecution sent defence counsel representing the accused its disclosure file, that is, the evidence is [under; *sont* in the French, should have been *sous*] the prosecution's control or in its possession, as soon as was possible." The evidence adduced in this application leaves no doubt that this statement was entirely incorrect.

[9] On November 8, 2006, the Administrator of the Court Martial informed the parties that, and I quote, [TRANSLATION] “there is currently a backlog of charges to be tried”. On November 10, 2006, Lieutenant-Colonel Dugas, defence counsel in this case, requested complete disclosure of the prosecution’s evidence, including access to the blood sample taken from Master Corporal Lelièvre. On November 14, 2006, Major Holman asked Ms. Springer to send him various items of evidence to be disclosed to the defence, as soon as possible, so that he could agree to a trial date in the near future with the defence. Having received no reply by December 4, 2006, Major Holman again asked Ms. Springer about the status of his request. On November 23, 2006, the prosecution sent the defence partial disclosure of the evidence, including the military police reports.

[10] Ms. Springer did not send the information requested by Major Holman, concerning the interview notes she took in July 2006 and on November 2, 2006, until December 20, 2006. On December 21, 2006, Major Holman drafted a summary of the testimony expected to be given by prosecution witnesses. That document was not provided to the defence until May 2007, when this Court Martial had been convened to begin on May 22, 2007.

[11] On January 10, 2007, Major Holman finally disclosed Ms. Springer’s notes to the defence. He informed the defence at the same time that the blood sample, to which access had been requested on November 10, 2006, was still being held at the forensic medicine institute in Aachen and that Ms. Springer would be able to help the defence get access to it.

[12] In February 2007, Major McMahon replaced Major Holman as prosecution counsel in this case, but the Court notes that he had already been on the case, as assistant, since May 4, 2006, that is, for nearly a year. The Court Martial was convened on March 20, 2007, for a trial to take place on May 22, 2007, one of the dates proposed by the Administrator of the Court Martial that had been agreed to by both parties.

[13] Throughout this period, Master Corporal Lelièvre and his immediate chain of command had been asking for an update on the status of the case from various sources, including by consulting the Internet site of the Office of the Judge Advocate General. They had obtained no useful information. Master Corporal Lelièvre was still waiting for a promotion to the rank of sergeant, and had continued to be employed in the same position since November 4, 2005. According to Chief Warrant Officer Bourdon, he continued to perform his duties competently and professionally. If he had been promoted to sergeant on December 1, 2005, he would have had 18 months’ seniority in his new rank. As of today, the cumulative loss, between his present pay grade and the pay grade for a sergeant with 18 months’ service, comes to $3,972 before taxes. The evidence is, however, that Master Corporal Lelièvre would have been reposted to Canada if he had been promoted, because he had turned down an unaccompanied

posting for one year in Greenland. And because he would have been returned home to Canada, he would have stopped receiving the foreign service premium. The evidence is also that during this period Master Corporal Lelièvre suffered from a high level of anxiety, beyond the anxiety associated directly with the charge, in particular because of the fact that his promotion was shelved until the disciplinary proceedings were completed. Those incidents also caused stress in the family, which was especially felt in the first few months after the incident. The Court has no evidence to show that the accused consented or waived any deadlines of any nature in this case. This then completes the summary of the evidence introduced in support of the application.

POSITIONS OF THE PARTIES

Applicant

Re: Violation of section 11(b) of the Charter

[14] The applicant is charged with an offence punishable under section 130 of the *National Defence Act*, that he operated a motor vehicle having consumed alcohol in such a quantity that the concentration in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, in violation of section 253(*b*) of the *Criminal Code*. The details of the charge are that the offence took place on or about November 4, 2005, at or near Geilenkirchen, Germany. The applicant submits that his right to be tried within a reasonable time, under section 11(*b*) of the Charter, has been violated and that this Court must direct a stay of proceedings under section 24(1) of the Charter, *inter alia* in view of the decision of the Supreme Court of Canada in *R. v. Morin*, [1992] 1 S.C.R. 771. The defence submits that the time that the Court should consider is 19 months, the time from the date of the incident, rather than 16 months, the time from the date of the initial charge, February 2, 2006, which corresponds to the date of the record of the disciplinary proceedings produced as Exhibit R1-2. The defence submits that the effect of the virtually immediate decision by the chain of command to delay Master Corporal Lelièvre's promotion, in the days after the incident of November 4, 2005, because of an image or perception problem, was to cause him prejudice, and so that date should be used as the starting point for calculating the time, even though the application is based on section 11(*b*) of the Charter. In support of the application, the defence argued that this is a relatively uncomplicated, and in fact routine case. It submitted that all of the evidence was rapidly available, including the police reports, and that the military counsel were also all available. Accordingly, the defence asks that the Court order a stay of proceedings.

Respondent

[15] The respondent acknowledges that Master Corporal Lelièvre did not waive the deadline. Despite what the defence contends, the respondent asks the Court to consider only February 2 as the date for the post-charge time, for the purposes of analysis under section 11(*b*) of the Charter. The prosecution submits that the nature of this case must be taken into account in the Court's calculation of the time requirements and argues that the facts of this case are such that the presumption set out in section 258 of the *Criminal Code* is not applicable and accordingly the nature of the evidence to be adduced by the prosecution contributed to the length of time that has elapsed. The prosecution submits that the steps taken, beginning in April 2006 and until the charge was laid on November 6, 2006, can be qualified as reasonable in the circumstances, having regard to the specific problems raised by this case. The prosecution also argues that the period going from November 2006 to today is explained by the scarcity of institutional resources. The prosecution bases its argument primarily on paragraphs 16 and 23 of the joint statement of facts, Exhibit R1-1. The prosecution also asks that the Court take into account, in the balancing exercise that it must carry out, the fact that offences of this nature committed outside Canada in a host country under the NATO agreements are a unique situation, and this weighs in favour of the public interest in prosecuting.

DECISION

[16] The defence submits that the right of the accused to be tried within a reasonable time has been violated. Section 11(*b*) of the Charter reads as follows:

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

That section of the Charter has generated major decisions both by the Supreme Court of Canada and by appellate courts, including the Court Martial Appeal Court. Section 11(*b*) focuses on each individual's interest in liberty and security of the person and right to a fair trial. However, section 11(*b*) also has an implied social or community component. If the justice system fails to dispose of criminal trials quickly and effectively, there will inevitably be frustration with the justice system in the community, and ultimately a feeling of frustration directed at proceedings in the courts. This is true not only in the case of civilian courts of criminal jurisdiction, but also in courts martial. In the military law context, Parliament has also expressly provided in section 162 of the *National Defence Act* as follows:

> 162. Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

This is particularly significant when offences are committed outside Canada and the host country agrees that members of the Canadian military be brought before a Canadian military tribunal under an international agreement, as is the case here for Germany, rather than prosecuting Canadian nationals in their own courts for penal or criminal offences committed within their own jurisdiction. Obviously, when a trial takes place within a reasonable time, with all the witnesses available and the memory of the events fresh in their mind, it is much more certain that guilty persons will be convicted and punished, and others will be acquitted and exonerated. The primary objective of section 11(*b*) of the Charter is to protect individual rights – the right to security of the person, the right to liberty and the right to a fair trial – as well as the interests of society as a whole. Accordingly, the general judicial approach to a determination of whether the right has been denied does not consist in the application of a mathematical or administrative formula but rather in balancing the interests which the section is designed to protect and the factors which either inevitably lead to delay or are otherwise the cause of delay. As defence counsel submitted, the factors to be taken into account are set out for us in *R. v. Morin*, according to which the factors to be considered in determining what length of time is reasonable are: (1) the length of the delay; (2) a waiver of certain time periods in the calculation; (3) the reasons for the delay, including time requirements of the case, actions of the accused, actions of the Crown, limits on institutional resources and other reasons for delay; and (4) prejudice to the accused. The time must be considered in its entirety, and not divided into discrete events. The courts generally acknowledge that whether the right to be tried within a reasonable time has been violated will depend on the facts of each case. The Charter therefore does not impose a specific timetable that applies to all cases.

[17] With respect to the length of the time and the starting point for calculating it, the Court cannot agree with the defence submissions regarding the calculation of the time. Clearly, in the case of an application that relates solely to section 11(*b*) of the Charter, only the post-charge time counts, unless the pre-charge time had an impact not in terms of the prejudice suffered by the accused, but in terms of his right to make full answer and defence, or if the pre-charge time in some way affected the integrity and fairness of the trial. With respect, the Court finds that the evidence on that point is not persuasive. In short, for the calculation of the time, the Court takes February 2, 2006, as the starting point, the concomitant delay being nearly 16 months. In the Court's view, that delay is sufficient in itself to raise the question of the reasonableness. The Court shares the opinion of the defence, that this is an uncomplicated charge, for which the evidence was readily and rapidly available. Certainly in this case the prosecution could not claim the benefit of the presumption of law set out in section 258 of the *Criminal Code*, since the witnesses involved in the incident were German police officers and the blood sample taken from the accused was apparently obtained under the German procedure. This is a matter that simply relates to

the mode of proof before the Court, complete evidence to prove the accused's blood alcohol level at the time of the alleged offence was called for. As to the additional evidence required in this case, a few additional witnesses had to be cited. In short, this kind of evidence is relatively simple to secure, if procedure is correctly followed. Indeed, the requirement for this kind of evidence at courts martial is not novel, if we review earlier decisions. Indeed, the Court Martial Appeal Court has recognized the legitimacy of the German procedure for taking blood samples in this kind of case, and the admissibility of that evidence before courts martial, in *R. v. Bernauer* (1988) 4 C.M.A.C. 570. Indeed, the last court martial trial held right here in Geilenkirchen for a similar charge, *Master Corporal Deans*, from the same unit, was quite analogous, in terms of the evidence, and that case was commented on by Chief Warrant Officer Bourdon in his testimony. In *Deans*, the Court noted, Major Cloutier was the military prosecutor, and that is the same person who was one of the counsel assigned to this case on April 28, 2006. The case of *Master Corporal Deans* began on May 25, 2004, based on a charge signed on February 6, 2004, relating to an incident that took place on or about April 20, 2003. Even if we assume that the charge was laid on the same day as the alleged offence was committed in *Deans* — which is highly improbable — the total time would have been 13 months.

[18] The evidence before this Court clearly shows that the accused did not waive any time periods. On the contrary, Master Corporal Lelièvre and his chain of command regularly consulted the Internet site of the Judge Advocate General. It seems that no one kept them informed of progress in this case, once it was placed in the hands of the military prosecutors. The time is therefore the same, and amounts to nearly 16 months.

[19] With regard to the reasons for the delay, it must be acknowledged that some delay is inevitable when people are to be brought before the courts for offences they have allegedly committed. That is true for all justice systems, be they civilian or military. In the military justice system, the statutory and regulatory framework (the set of rules that apply to the charge and up to the court martial, where applicable) sets up a number of benchmarks that are primarily designed to protect the integrity of the system. They include the obligation to obtain legal opinions before a person can be charged with certain categories of offences; a procedure for referring charges to a higher authority; the exclusive authority assigned to the Director of Military Prosecutions to initiate a prosecution before the Court Martial by laying a charge against a person accused of committing a service offence as defined in section 2 of the *National Defence Act*; and the exclusive authority of the Director of Military Prosecutions to charge people to be tried by courts martial and to conduct prosecutions before the courts martial. The strengths of this kind of system are also its weaknesses. Even though the main objective of the system is to avoid abuses of process to the detriment of accused persons under the Code of Service Discipline, it must be acknowledged that it carries with it an

administrative complexity and inherent time requirements that are greater than in the civilian prosecution system.

[20] With respect to the prosecution itself, consideration must be given to the complexity of a case, disclosure of evidence, preparation for trial by counsel and the availability of counsel to try the case and of judges to hear the case. In this case, we have a relatively uncomplicated offence, as I explained earlier. The inability of the prosecution to rely on the presumption in section 258 of the *Criminal Code* relates not to the complexity of the case but to the means of proof available. I understand that the prosecution has to offer additional evidence to prove the blood alcohol level, but this situation is not comparable to a situation in which the prosecution had to call a battery of complex accident scene reconstruction experts, where there is little direct evidence. Here, the evidence would be relatively simple. For example, it might involve the testimony of the police who observed the accused operating a vehicle, the testimony of the persons involved in obtaining the blood sample from the accused and up to analyzing the sample, and an expert or experts in chemistry, pharmacology, internal medicine or other specialties, who would be able, based on a blood sample analysis report, to extrapolate the accused's blood alcohol levels at the time he was operating his vehicle and testify, where applicable, as to ability to operate a motor vehicle at the time the alleged offence was committed. Certainly, that kind of evidence makes the preparation and the trial longer, but not significantly. The case of *Corporal Deans* is a good example: a total of 13 months between the date of the offence and the date of the trial. For uncomplicated impaired driving offences, eight to 10 months from the date of the charge seems to me to be a reasonable time. In cases where the nature of the evidence required and the complexity of the case make it necessary, a few additional months might be needed, particularly if the prosecutor assigned to the case is not on site. The prosecution offered no evidence to support a claim as to the complexity of the case, except for the fact that it could not rely on the presumption in the *Criminal Code*.

[21] With respect to the accused's actions, there is no evidence that he contributed to the delay or waived any time periods. Even if we accepted that the delay caused by choosing a trial date convenient to the accused or his counsel could be imputed to him, the fact that he approved the May 22 trial date on March 20, by agreement with prosecution counsel, is entirely acceptable in the context of this case.

[22] There is no denying that the action or inaction of the prosecution calls for a serious analysis in this case. On May 4, 2006, Major Holman and Major McMahon were assigned to the case as counsel, replacing Major MacLeod and Major Cloutier. Nonetheless, it appears from the evidence of record that only Major Holman was involved in the preparation of the case, that is, in the initial questioning and preparation of witnesses, disclosure of the evidence and all of the conversations and discussions with the liaison officer, Ms. Springer, both in Geilenkirchen and by e-mail. In early July 2006, Major Holman spent five days in Germany to prepare this case, and there he met

with the witnesses who were to testify as to the facts and the potential expert witnesses. The evidence is that the prosecution was already familiar with the ins and outs of the case, including the potential evidentiary problems, since Major Holman had written to Ms. Springer on June 5, 2006, telling her that he had reviewed the police reports, including the translations of the German police reports relating to the case. The Court accepts that the prosecution needed some additional information that had to be secured from various witnesses after that date, but Major Holman himself told Ms. Springer, on July 20, 2006, that he planned to finalize the case before going on vacation at the beginning of August. It also seems that some telephone interviews were held on or about August 21, 2006. Also in mid-August 2006 Major McMahon, one of the prosecutors in this case, was transferred to the prosecutions branch as Regional Counsel, Central Region.

[23] As I said earlier, it seems that this case remained inactive before September 25, 2006, when Major Holman asked Ms. Springer by e-mail to send him her notes from the telephone interviews the previous month and certain additional information about the expert witness. I would like to quote again the reply she gave him, on October 5, 2006: “I just left you a voice mail. Last night, in going through my basket, I noted your email that I had somehow overlooked before. Please excuse. I will aim to get the file completed and have it to you NLT Monday...” That was on October 5, 2006.

[24] Major Holman contacted Ms. Springer by e-mail on October 17, 2006, to acknowledge receipt of the information requested on September 25, 2006, and here we have a discrepancy. He also asked that she send him her personal notes, taken in the interviews of all the other witnesses.

[25] On November 2, 2006, Major Holman questioned the expert witness, by conference call. Ms. Springer was present for the conversation. Ultimately, on that date, Major Holman recommended to the Assistant Director of Military Prosecutions that a charge be laid against Master Corporal Lelièvre. As I said earlier, once again the memorandum that accompanied the charge indicated that there had not yet been disclosure of the evidence because Major Holman had not received Ms. Springer’s notes from the interviews in July 2006. We must recall that also on November 6, 2006, when the Assistant Director of Military Prosecutions laid the charge, he said that the prosecution had sent defence counsel disclosure of the evidence under its control or in its possession, and that this was done in the shortest time possible. I do not need to reiterate that this statement was entirely incorrect.

[26] On November 8, 2006, the Administrator of the Court Martial informed the parties that [TRANSLATION] “there is currently a backlog of charges to be tried”. On November 10, 2006, Lieutenant-Colonel Dugas requested complete disclosure of the prosecution’s evidence, including access to the blood sample taken from Master Corporal Lelièvre. On November 14, 2006, Major Holman asked Ms. Springer

to send him various items of evidence to be disclosed to the defence, as soon as possible, so that he could agree to a trial date in the near future with the defence. When he had received no reply by December 4, 2006, Major Holman again asked Ms. Springer what was going on with his request. On November 23, 2006, the prosecution sent the defence partial disclosure of the evidence, including the military police reports.

[27] Ms. Springer did not send the information requested by Major Holman, concerning the interview notes she took in July 2006 and on November 2, 2006, until December 20, 2006. No evidence was presented by the prosecution to justify that delay in sending Ms. Springer's interview notes to Major Holman, the effect of which — and I stress this — was to pointlessly delay the process of laying the charge, which is closely connected with the prosecution's duty to disclose. This is not the place to attribute bad faith to anyone, but there is no evidence to explain these delays or this inaction to the Court, and absent any reasonable explanation, this delay must be imputed to the prosecution. The disclosure of the notes to the defence, on January 10, 2007, notes that had been obtained on December 20, 2006, that is, before the Christmas holidays — disclosure of the notes might ordinarily have been explained by the Christmas and New Year holidays, but in the context of this case, where there had been delay upon delay, waiting time upon waiting time, it is difficult to understand why those notes were not disclosed before December 24, 2006, given the delays that had already accumulated in the case. The prosecution's duty to disclose is on-going, and the law does not impose an obligation on the prosecution to meet its disclosure duty as soon as possible. However, in examining the delay associated with the prosecution's actions, in an application under section 11(*b*), the issue is not the duty to disclose and how it was fulfilled, except in so far as it contributes to the prejudice suffered by the accused or impairs the right to make full answer and defence, or in some way affects the integrity of the trial. That is not the case here. The extreme slowness demonstrated by the prosecution in gathering the documents needed for finalizing its case, including meeting its obligation to disclose, however, seems to be a key and troubling factor in examining the delay associated with the prosecution's actions or inaction. In the Court's view, there is no reason why this case could not have been completed before September 2006, subject to obtaining further information. It seems, or it must be noted, that the prosecution chose not to treat this case as a priority, or other events, of which the Court was not informed, meant that the case dragged on, while the accused saw his promotion unduly delayed in a pointless and unwarranted manner. Perhaps somebody in the chain of command should have informed the Director of Military Prosecutions about the situation, or asked him to proceed as quickly as possible, through its legal counsel, because of the unique circumstances of the case. Perhaps it would have been wise for regional counsel in Ottawa to ask legal counsel in the unit for information about any special ingredients of a case like this outside Canada, if any. This is all mere conjecture and speculation. What is certain is that better communication among the various actors and a better understanding of the circumstances in an impaired driving case in Germany and the consequences often

associated with it would undoubtedly have contributed to this case being handled more expeditiously.

[28] As to the summary of the prosecution's anticipated testimony, which was sent to the defence only a few weeks before proceedings commenced in May 2007, the charge having been laid in early November 2006 and the summary drafted by Major Holman having been prepared on December 21, 2006, it is conceivable that the summary could have been sent to the defence a little sooner, but the prosecution's duty in this respect is defined at paragraph 111.11(1) of the QR&O, which reads as follows:

> (1) Before a trial by court martial commences, the prosecutor shall:
>
> > (*a*) notify the accused of any witness whom it is proposed to call; and
> >
> > (*b*) inform the accused of the purpose for which a witness will be called and of the nature of the proposed evidence of that witness.

[29] On the question of the limits on institutional resources in this case, the prosecution submits that the effect of paragraphs 16 and 23 of the joint statement of facts, Exhibit R1-1, is to show that there were in fact limits on institutional resources. Indeed, in November 2006, there was a backlog of charges to be tried, as paragraph 16 of the joint statement of facts indicates. I would add that this will always be the case. It is always so in any justice system anywhere. The consequence of that fact is simple: the prosecution must decide which cases are to be treated as priorities, in the public interest. Recent cases are often tried in priority over older cases when the prosecution believes it is in the interests of the administration of military justice to do so. Sometimes, defence counsel will ask that a case be heard as quickly as possible. In some cases, the parties agree on early dates, sometimes one of the parties applies to a judge to set a date before or after the one in the convening order. In other words, a backlog of cases does not necessarily mean that the parties cannot deal with certain cases as priorities, with the consequences entailed. The management of a judicial calendar is not a static, immutable exercise in which the cases follow, one after the other, in a specific order. It has to take into account different and sometimes competing interests advanced by the parties, which have to be incorporated into a balancing process by the persons responsible for the administration of the courts, to ensure a proper administration of justice. The process of convening courts martial is no different, despite the constraints unavoidable in the absence of a permanent court. In view of the evidence in this case, considered as a whole, the Court cannot deduct some specific time, or consider some portion of the delay to be neutral, for reasons relating to limits on institutional resources. There is nothing in the evidence before this Court to show that a case of this nature could not have been heard within a time comparable to the time in the case of *Master Corporal Deans* which was heard right here in Geilenkirchen in February 2004.

[30] As to the prejudice suffered by the accused, it is real and unjustified. For a promotion to be delayed by several months for administrative reasons, because of pending disciplinary proceedings, is entirely unreasonable. However, given the progress or lack of progress in the case, there was nothing to prevent the military authorities, including those at National Defence Headquarters in Ottawa, from granting the promotion that had been shelved because of the lengthy delays while waiting for a Court Martial. This is of little consequence, because the question of prejudice under section 11(*b*) of the Charter is to be considered not from that standpoint, but from the accused's. To the accused, there was a real and significant prejudice in the circumstances, not in terms of the financial loss caused by not having the promotion, which was in part compensated for by the foreign service premium that the accused continued to receive because he had not been returned home to Canada as his new rank would have meant, but more importantly because of the stigma the accused suffered, which lasted longer than was necessary or should have been necessary in the circumstances of a case of this nature. Even though the prejudice suffered by the accused because of that delay was the deciding factor in this case, the Court is of the opinion that this is a case in which the evidence would have been sufficient, in the Court's view, each case turning on its facts, to allow the Court to infer that the accused did suffer a prejudice.

Decision

[31] Accordingly, the Court allows the application of the defence and directs orders that the proceedings of this Standing Court Martial be stayed in the case of Master Corporal Lelièvre.

COLONEL M. DUTIL, C.M.J.

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