Citation: *R. v. Corporal H.L. Gibbons,* 2007 CM 1021

Docket: 200711

STANDING COURT MARTIAL
CANADA
REGINA, SASKATCHEWAN
16 (SASKATCHEWAN) SERVICE BATTALION

Date:24 August 2007

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

HER MAJESTY THE QUEEN
(Respondent)
v.
CORPORAL H.L. GIBBONS
(Applicant - Accused)

DECISION CONCERNING AN APPLICATION UNDER SECTION 11 *b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR A VIOLATION OF THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME
(Rendered orally)

INTRODUCTION

[1] Corporal Gibbons is charged with two offences under the *National Defence Act*. The first charge alleges a contravention of s. 114 of the *Act*; stealing, where the second charge alleges a violation of s. 97 of the *Act*; namely, the offence of drunkenness. The incidents in support of the charges took place on or about 11 November 2005 or 12 November 2005, at the Pump Road House, Regina, Saskatchewan, while the accused was subject to the Code of Service Discipline.

[2] This is the decision of this court further to an application made by the accused pursuant to Queen's Regulations and Orders article 112.05(5)(*e*) for a stay of proceedings under s. 24(1) of the *Canadian Charter of Rights and Freedoms* further to an alleged infringement of his right guaranteed by s. 11 *b*) of the *Charter* to be tried within a reasonable time.

THE EVIDENCE

[3] The evidence in support of this application consists of the following:

a. The facts and matters for which the court has taken judicial notice under s. 15 of the *Military Rules of Evidence*;

b. the testimonies heard during the application, namely: Corporal Gibbons, Sergeant Lukacz, Sergeant Williams, Lieutenant-Colonel Peachey and Major Hrycyna;

c. the following documentary exhibits:

i. Exhibit M1-1: facts admitted by the prosecution, the respondent in this case;

ii. Exhibit M1-2: a Canadian Forces Health Services Form, Claim Number 576358;

iii. Exhibit M1-3: that is a letter dated 14 June 2006, signed by Lieutenant-Colonel Peachey, to Commander LFWA, referring the case of Corporal Gibbons to the referral authority for disposal (this letter is the subject of paragraph 4 of the admissions made by the respondent); and

iv. Exhibit M1-4: a letter dated 28 November 2006, signed by Lieutenant-Colonel Peachey to LFWA G1 further to a request for further information that provides the additional information as requested (this letter is the subject of paragraph 6 of the admissions made by the respondent).

THE FACTS

[4] The charges in this matter were laid against Corporal Gibbons on 18 April 2006 by Chief Warrant Officer Elmer, Regimental Sergeant Major 16 (Saskatchewan) Service Battalion. These charges arose from a series of events involving theft and drunkenness allegedly committed at a civilian local nightclub on Remembrance Day on 11 November 2005, where Corporal Gibbons was wearing his military uniform. The testimony of Sergeant Lukacz indicates that the military police investigation in this matter involved the audio and video interview of various civilian witnesses and liaison with civilian police authorities, as well as traveling from Dundurn to Regina in order to meet with witnesses and the suspect. The investigation was

completed in mid or late December 2005. The court concludes that this was a relatively simple case. As the pre-charge delay is not an issue in this application, the period between December 2005 and the laying of the charges in April 2006 does not require a careful examination. At the time of the alleged incident, Corporal Gibbons was on class "B" service, that is on full-time service with his reserve unit. Corporal Gibbons was a logistician performing mainly the duties of a storeman at the garrison of 16 (Saskatchewan) Service Battalion, here, in Regina. Sergeant Williams was his immediate supervisor.

[5] The evidence reveals that approximately two months after the charges being laid, that is on 7 June 2006, Lieutenant-Colonel Peachey, Commanding Officer 16 (Saskatchewan) Service Battalion, informed Corporal Gibbons that he had decided to refer the matter to Commander Land Forces Western Area with a recommendation for a trial by court martial. On the same date, Corporal Gibbons chose to be represented by defence counsel appointed by the Director of Defence Counsel Services. The signed form was sent to the Directorate of Defence Counsel Services by facsimile that same day.

[6] On 14 June 2006, Lieutenant-Colonel Peachey sent the referral letter to Commander Land Forces Western Area. The letter was received at Headquarters Land Forces Western Area on 19 June 2006 and, following review by the Office of the Judge Advocate General (Western Region), was returned to Lieutenant-Colonel Peachey with a request for further information. Lieutenant-Colonel Peachey testified that during the summer months the unit sees very little activity, especially in the garrison, according to him, only urgent or emergency matters are dealt with. He testified that he is the commanding officer of several reserve units, including 16, 17 and 18 Service Battalion, as well as being extremely busy in his civilian employment. He added that his full-time staff officer had to be replaced during that period and that his replacement was tasked by the brigade to perform other duties for an extended period of time as a result of casualties in Afghanistan with the duty to provide adequate support and guidance to the aggrieved families. In addition, he attended a conference in the Maritimes and extended his stay for a short vacation during late summer/early fall 2006. In any event, the evidence indicates that it is not before October 2006 that Lieutenant-Colonel Peachey could put his mind to the request to provide the additional information as requested.

[7] On 28 November 2006, Lieutenant-Colonel Peachey finally sent a second letter to Commander Land Forces Western Area providing the additional information as requested. On 17 January 2007, following advice provided by the Judge Advocate General (Western Region), Major General Skidmore, Commander Land Forces Western Area, referred the file to the Director of Military Prosecutions. The file was received in Ottawa on 25 January 2007.

[8] On 29 January 2007, Lieutenant-Colonel MacGregor, Deputy Director of

Military Prosecutions, assigned the file to Captain Henderson, Regional Military Prosecutor (Western Region). The file was received by Regional Military Prosecutions (Western Region) on 31st January 2007.

[9] Captain Henderson completed post-charge review and sent the file back to the Deputy Director of Military Prosecutions on 28 February 2007. Captain Henderson sent initial disclosure to the Directorate of Defence Counsel Services on 1 March 2007. Captain Henderson also requested further information relating to the investigation from the Military Police Detachment at Dundurn.

[10] The Director of Military Prosecutions preferred two charges against Corporal Gibbons on 8 March 2007, to be tried by standing court martial. On 14 March 2007, Captain Henderson called the Director of Defence Counsel Services to request the name of defence counsel for Corporal Gibbons. Lieutenant-Colonel Dugas' legal assistant informed him that Lieutenant-Colonel Dugas was away and counsel had not yet been appointed. On 22 March 2007, Captain Henderson sent a second package of disclosure to the Directorate of Defence Services.

[11] On 3 April 2007, Captain Bussey, Regional Military Prosecutions (Western Region) sent an email to Lieutenant-Colonel Dugas to request confirmation that he and Lieutenant(N) Létourneau would be co-counsel for Corporal Gibbons and to request a trial date. On 11 April 2007, Lieutenant-Colonel Dugas indicated that it would not be possible to set a date at that stage as he would be away from the office for a further two weeks and Lieutenant(N) Létourneau had not yet arrived in the directorate.

[12] On 1 May 2007, Captain Henderson contacted Lieutenant-Colonel Dugas by email to again request available days for trial. At that time, Lieutenant-Colonel Dugas responded that Lieutenant(N) Létourneau would be defence counsel for Corporal Gibbons. On the same day, following discussion between prosecution and defence regarding available trial dates and availability of counsel, Lieutenant(N) Létourneau contacted the court martial administrator to request that the trial date be set for the week of 20 August 2007 as agreed with Captain Henderson. The convening order for the trial was signed by the court martial administrator on 23 May 2007. The trial was set to commence on the 21st of August 2007.

[13] The testimonies heard during the application provide the following additional elements as they relate more precisely to Corporal Gibbons during the period between November 2005 until today. The evidence indicates that despite the pending military charges against him, Corporal Gibbons' class "B" service contract was renewed in March 2006. According to the testimony of Sergeant Williams, whose only subordinate was Corporal Gibbons for the greater majority of the period during which he had the applicant under his supervision, this renewal was granted despite the alleged incidents after he had discussed with the other members of the board responsible to

renew the contract and convinced them to do so.

[14] Corporal Gibbons testified that following the events, it created tension between him and his mother. He became grouchy. As a result, he did not spend as much time as usual with her. He added that some tension built up with his coworkers. Corporal Gibbons testified that he knew that other people were aware of the allegations against him. He stated that some would ask what had happened directly, where others would be talking in his back. According to Corporal Gibbons, they acted differently, including his supervisor, Sergeant Williams. He further stated that this situation lasted approximately six months and then it faded away. Corporal Gibbons testified that following the events his relationship with other superiors of the Battalion changed. He testified that superiors picked on him for various incidents such as being reprimanded for having parked his vehicle in an unauthorized area or wearing inadequate clothing, where others had done similar things without consequences to his knowledge. He also described an incident where a superior counselled him for having entered the storage room in sandals a previous day based on erroneous information. Corporal Gibbons felt stigmatized. He testified that after November 2005, he was worried because of the events. He did not enjoy work as much and started behaving worst than previously. He felt crappy. Corporal Gibbons testified that he started to have difficulty sleeping and talked to a medical assistant. He then saw a civilian doctor at the unit who prescribed some medication to him and referred Corporal Gibbons to a counsellor. According to him, the initial dosage did not help and the prescription had to be changed months later. Corporal Gibbons continues this medication as of today. However, there is no evidence before the court as to the diagnosis and the type of drugs taken by the applicant other than for this health issue, other also than what appears from Exhibit M1-2, which has very little probative value except to demonstrate that the applicant prepared and signed that claim form on 10 August 2006. The document does not indicate if it was submitted and received, nor does it indicate the type of drugs to be reimbursed. Major Hrycyna who was the officer commanding the garrison and who would have normally been made aware of a medical situation involving one of his subordinates, said that he ignored that Corporal Gibbons had suffered from any illness, except for a sport injury that required physiotherapy.

[15] The evidence also indicates that Corporal Gibbons was involved in an incident that lead to criminal charges in 2006 when he was party to an altercation that took place near his grandparents' home. This matter would have been resolved in February/March 2006, but not without causing him concerns, including a weapons prohibition order until he was later unconditionally discharged. However, this prohibition had a direct impact on his employment with the Canadian Forces because he could no longer be involved with service weapons for a period of time. The evidence further reveals that Corporal Gibbons was involved in a vehicle accident in December for which he had to be absent from the unit for an unspecified period. Corporal Gibbons is still the subject of other court proceedings which have yet to be resolved.

[16] Sergeant Williams, his supervisor until the termination of Corporal Gibbons' class "B" service contract, testified that Corporal Gibbons became a storeman in 2003 as a private. Despite having regular shortcomings in showing up late for work, which led to formal counselling and probation, he felt that Corporal Gibbons progressed and showed promise. Corporal Gibbons was the only subordinate under Sergeant Williams for the most time. It is clear from his testimony and his behaviour in court, that he had a mentor relationship with the applicant throughout that period, if not a father/son relationship. This may explain to some extent the behaviour demonstrated by Sergeant Williams during his testimony where he appeared evasive on several occasions and tried to avoid saying words that could be perceived negatively on Corporal Gibbons. When pressed by counsel for the respondent, he had to be reprimanded by the court and told to answer questions put to him. The evidence of Sergeant Williams and Major Hrycyna leaves no doubt that Sergeant Williams is a very soft and caring supervisor who took at heart the well being of his only subordinate, and does to this date. Sergeant Williams described himself as a forgiving supervisor, where Major Hrycyna said of Sergeant Williams that he was overprotective of Corporal Gibbons. Sergeant Williams counselled him not only for the incident before the court, but for many other incidents as previously mentioned. Sergeant Williams' entire testimony demonstrate that Corporal Gibbons and him had several counselling sessions over a relatively short period, that is approximately three years, mostly for behaviour or misconduct problems, some related to the workplace, some not related to the workplace. Nevertheless, he felt that Corporal Gibbons was under the gun with the other superiors of the unit. Sergeant Williams described several occasions where Corporal Gibbons had been reprimanded or counselled when performing duties in his absence. Except for the incident concerning the wearing of sandals, Sergeant Williams's perception is consistent with his style of leadership, but the court is not satisfied based on the description of the incidents that the other superiors were unnecessarily harsh or picky towards Corporal Gibbons. To the contrary, the superior's response to Corporal Gibbons' behaviour was fair and proportionate. Sergeant Williams testified that he felt outraged and upset when a colleague provided him with a draft Personnel Evaluation Report for Corporal Gibbons for the year 2005/2006. He added that he ripped it into pieces, before retrieving it. Sergeant Williams stated that this draft was changed with his colleagues to show that Corporal Gibbons was developing. Major Hrycyna, who testified in an honest and straightforward manner, agreed that the final version of the document was accurate to show that Corporal Gibbons was developing. When counsel for the applicant suggested that the scores were very low, Major Hrycyna stated that this report was normal for someone who only had one year at the rank of corporal. The court found the explanation provided by Major Hrycyna to be totally logical, coherent and credible as well as his entire testimony.

[17] The applicant testified that he voluntarily terminated his class "B" service contract one month earlier before it expired in March 2007 in order to secure new employment with Sask Power. Corporal Gibbons testified that he made his decision

based on the advice of Sergeant Williams who expressed concerns that he might not be renewed this time, although he had been for the year 2006 despite the incident of November 2005 which was still pending. Major Hrycyna stated that Sergeant Williams' concerns were unfounded. As the Officer of Primary Interest or OPI for that specific issue, Major Hrycyna testified that not only no decision had been made in advance before the competition for renewal of Corporal Gibbons' contract, but a conscious decision had been made not to consider the incident of November 2005 for the purposes of renewal as Corporal Gibbons had not been proven guilty. In any event, Corporal Gibbons found employment with Sask Power around February 2007 which required him to leave Regina for Weyburn, Saskatchewan, therefore having to terminate his class "B" contract before 31 March 2007. Although engaged temporarily at first, pending the completion of a one week skills course, Corporal Gibbons was given a permanent employee status shortly after. The evidence before the court indicates that his bi-weekly earnings are now at least 200 dollars more than his military pay when serving on class "B" service. As his presence in court confirms, he is now serving as a class "A" reservist, but does not participate in regular unit activities because of his current employment which is located at a fair distance of Regina. Corporal Gibbons further testified that he made inquiries with Sergeant Williams, who corroborates it, on two or three occasions in September 2006, as to the progress of the disciplinary proceedings against him with no success. This concludes the summary of the evidence in this application.

POSITION OF THE PARTIES

[18] The applicant submits that his right to be tried within a reasonable time guaranteed under s. 11 *b*) of the *Charter* has been violated in the circumstances. He states that for a somewhat simple offence, more than 21 months have elapsed since the alleged infraction and more than 16 months since the date of the Record of Disciplinary Proceedings to bring this matter to trial. He argues that this period has increased the stress and anxiety and caused him real prejudice. In support of the alleged prejudice, the applicant further argues that he suffered from stigmatization by his superiors and coworkers, which lasted longer than was necessary or should have been necessary in the circumstances of this nature. This situation would have caused him difficulties with the relationship he had with his mother. During that same period, he had to consult a physician who prescribed him medication that he continues to take today. In addition, his contract on class "B" service was terminated further to his own resignation, which was based on the advice of his supervisor who thought that Corporal Gibbons would not be renewed in March 2007 because of the pending disciplinary proceedings. The applicant submits that no delay can be attributed to the accused or to constitute a waiver by the accused. Therefore, the applicant requests the court to order a stay of proceedings under s. 24(1) of the *Charter.*

[19] The respondent submits that this application should be denied. It

concedes that the overall delay justifies a review as to its reasonableness. The respondent further concedes that the delay between July and November 2006—where there was no action by the commanding officer further to a request of information by the referral authority—is *prima facie* unreasonable. Counsel for the respondent finally submits that the applicant has not established prejudice.

DECISION

[20] At the outset, it must be stated that the burden of proof to establish, on a balance of probabilities, the breach of his rights to be tried within a reasonable time under section 11 *b*) of the *Charter* rests on the applicant, but an evidentiary burden of putting forth evidence or argument on particular factors will shift depending on the circumstances of each case. Section 11 *b*) of the *Charter* reads as follow:

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

Over the recent years, the Supreme Court of Canada and various appellate courts, including the Court Martial Appeal Court, have had the opportunity to make several rulings and provide guidance to the lower courts with regard to the ambit to the right to be tried within a reasonable time under s. 11 *b*) of the *Charter*. In *R. v. Morin* [1992] 1 S.C.R., 771, the Supreme Court mentioned that the purpose of s. 11 *b*) of the *Charter* is to protect specific individual rights which are the right to security, the right to liberty and the right to a fair trial; however, the court clearly expressed in *Morin* that these rights must be assessed in the context as a whole of the existence of a societal interest for:

> ....ensuring that those who transgress the law are brought to trial and dealt with according to the law.

I refer to paragraph 30 of the *Morin*'s decision.

In a military context, this social interest must include the intrinsic purpose of the military justice system that "has for purpose to control and influence the behaviours and ensure the maintenance of discipline with the ultimate objective to create favorable conditions for the success of the military mission."[1] Amongst its core characteristics, the Canadian system of military justice must be fair, swift and portable. S. 162 of the

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1 Jean-Bruno CLOUTIER, *L'utilisation de l'article 129 de la Loi sur la défense nationale dans le système de justice militaire canadien*, thèse de maîtrise, Ottawa, Faculté des études supérieures, Université d'Ottawa, 2003, p. 17

National Defence Act provides:

> **162.** Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit. R.S., 1985, c. N-5, s. 162; 1998, c. 35, s. 42.

However, the legislator has imposed mandatory safeguards to those having the authority to lay charges and other military authorities vested with disciplinary powers in order to balance the need to proceed expeditiously to maintain and enforce military discipline with the inherent requirements of fairness and individual rights. In the military justice system, the statutory and regulatory framework sets up a number of checks and balances 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 for certain categories of offences, a procedure for referring charges to higher authority, the exclusive authority assigned to the Director of Military Prosecutions to prefer charges before a court martial and conduct the prosecution before these courts. S. 162 of the *Act* does not, in my view, imposes an additional burden to the prosecution in answering a claim that an accused person's right to be tried within a reasonable time under section 11 *b*) of the *Charter*. However, the duty to act expeditiously pursuant to s. 162 of the *Act* is definitely a relevant factor in the assessment of the delay.

[21] As I stated in *R. v. Master Corporal J.E.M. Lelièvre*, 2007 CM 1012 on 25 May 2007, the primary objective of s. 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 formula but rather in balancing the interests that the section is designed to protect and the factors which either inevitably lead to delay or are otherwise the cause of that delay. The factors to be taken into account are set out for us in *R. v. Morin* [1992] 1 S.C.R., 771, at paragraph 27, according to which the factors to be considered in determining what length of time is reasonable are:

(a) the length of delay;

(b) the reasons for the delay;

(c) whether the accused waived his right to be tried within a reasonable time; and

(d) prejudice caused to the accused's defence by the delay.

In considering the reasons for the delay, the court must consider the inherent time requirements of the case, the actions for the delay, any limits on institutional resources

and any other reasons for the delay. 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.

[22] I will now embark onto the analysis concerning this application. As previously stated, the first factor is the length of the delay. The court is satisfied—and the prosecution concedes—that the post-charge delay of 16 months; that is, from April 2006 until August 2007, raises an issue as to its reasonableness.

[23] The second factor requires the court to determine the existence of any waiver by the accused person to any time period before embarking on the more detailed examination of the reasons for delay. The court is satisfied that the evidence is not conclusive that Corporal Gibbons explicitly waived clearly and unequivocally his rights under s. 11 *b*). However, it must be kept in mind that the actions or inactions of the accused or his counsel can amount to a waiver or be attributable to the accused when examining the reasons for delay or ultimately be assessed in the context of the prejudice to the accused. In *Criminal Pleadings and Practice in Canada,* Canada Law Book, Ewaschuk, J., at paragraph 31:14210, makes the following remarks:

> **31:14195 Waiver of time periods**
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> An "accused may explicitly or implicitly *waive* in whole or in part" the right to complain of delay which may dispose of the matter or may result in the period waived being deducted from the delay to be considered. Thus, consent to a trial date may give rise to an inference of waiver,
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> *R. v. Heikel* (1992), 72 C.C.C. (3d) 481 (C.A.)
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> particularly when there is no evidence that the trial date was set because no earlier date was available
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> *R. v. Slaney* (1992), 75 C.C.C. (3d) 385 (Nfld.C.A.), affd [1993] 2 S.C.R. 228
>
> though "mere acquiescence to the inevitable" will *not* constitute waiver which must be clear and unequivocal. However, acquiescence may be relevant to the factor of actual prejudice.
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> *R. v. Morin*, [1992] 1 S.C.R. 771

In this context the court will examine the delay between 1 May until this date under the topic "actions of the accused" and the analysis relating to actual prejudice.

[24] 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. My comments made

earlier with regard to s. 162 of the *Act* as well as the statutory and regulatory framework designed to protect the integrity of the system must be kept in mind in the analysis of the third factor set out in *Morin*. This case is not complex in any aspect. In the present case, the court is satisfied based on the evidence that in the context of disciplinary proceedings that involve the referral of charges to higher authority with a recommendation to convene a court martial in the case of a reserve unit may require additional time to process the matter. This is particularly evident when most people serving in this unit are performing on a part-time basis or class "A" reserve service, including the commanding officer that is the key player in the process. However, this reality cannot serve as a shield to unduly delay the process in order to unreasonably increase the inherent time requirements to deal with the disciplinary matter. With respect, I defer from the opinion expressed by Brais C.M.J., as he then was, in the standing court martial of Private Fair, where he stated at p. 122 of the transcript:

> With the current system of legal advisors and military police investigators spread across Canada, the dedicated officers who act exclusively as military prosecutors and defending officers, it is impossible to accept that such a relatively simple, albeit serious, case would take more than two or three months to prepare and to bring before a court martial.

In my view, such a statement does not recognize the presence of the statutory and regulatory framework designed to protect the integrity of the system that adds to the inherent time requirements which are exacerbated in the context of reserve units. A review of court martial transcripts since the military justice reform in 1998 would not support the conclusion that simple cases of theft are normally dealt with at court martial within two or three months. This is simply not the case, although it may be a goal that those involved in the process should try to achieve. I would hold the view that the inherent time requirement for such a case should be in the realm of four to six months, a period that might sightly increase for reserve units depending of the circumstances. Each case has to be examined on its own merit.

[25] In terms of the actions by the accused that would account for the delay, counsel for the applicant argues that his own action cannot be imputed to the accused, Corporal Gibbons. He relies mainly on the decision rendered on 1 August 2007 by Lamont M.J. in *R. v. ex-Corporal Rioux*, 2007 CM 2011. In *Rioux*, the military judge identified the main reasons for delay by stating at paragraph 8:

> [8] In my view, the chief reasons for delay in the present case are the accommodating of the scheduling of defence counsel and the unavailability of sufficient judges during the period.

The military judge further emphasized at paragraph 10 that the prosecution had conceded that the institutional resources count against the prosecution. The decision of Judge Lamont can be distinguished from this case on the factual basis alone. There is no credible nor reliable evidence before the court as to the lack of judges or the

unavailability of judges that would have contributed to the overall delay in these proceedings. To the contrary, this court was convened to take place at the very first date requested by both counsel. In *Rioux*, the military judge stated at paragraphs 13 and 14:

> [13] Defence counsel advises that, at the time of this intimation, he was unaware of the health circumstances of his client, that he now argues are exacerbated by the delay in setting trial time. The prosecution submits, that in setting trial time, they were entitled to rely upon the representation of the defence that there was no urgency involved in setting trial time. Cases such as *R. v. Barkman,* from the Manitoba Court of Appeal, are cited in support of the proposition that the defence can hardly complain of delay to trial when the trial time is set to accommodate the busy schedule of defence counsel.
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> [14] In my view, this argument has but little application to proceedings at court martial. The *National Defence Act* provides, at section 162, that:
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> > **162.** Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.
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> This statutory provision distinguishes proceedings at court martial from criminal charges before the civilian courts. As I stated in the case of *ex-Corporal Chisholm*:
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> > The unnecessary lapse of time between the commission of an offence and punishment following a trial diminishes the disciplinary effect that can be achieved only by the prompt disposition of charges. This distinguishes the system of military justice from the civilian criminal justice system where there is no disciplinary objective, nor is there any statutory obligation on any of the actors to proceed promptly at all stages of a prosecution.
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> In my view, this clear statutory obligation reinforced the obligation upon the prosecution to bring the accused to trial promptly, whether the defence was content with the slow pace of proceedings or not.

[26] With respect, I disagree with this conclusion. The statutory obligation imposed by s. 162 of the *Act* cannot be interpreted to provide additional rights to an accused under s. 11 *b*) of the *Charter* and thus modify the test set out by the Supreme Court of Canada in *Morin* as well as decisions made by various appellate courts in this country with regard to the factors related to the actions of the accused which include the actions of his counsel. In *Regina v. Bennett* (1991), 64 C.C.C. (3d) 449, affirmed by the Supreme Court of Canada at [1992] 2 S.C.R., 168, Arbour J.A., for the Ontario Court of Appeal, as she then was, stated at page 458:

> I have great difficulty in concluding that an individual charged with an offence has been denied the constitutional right to be tried within a reasonable time where there is no evidence that the individual wanted to be tried at a date earlier than that set for trial. Such a conclusion is based on the premise that

> every person charged with an offence is anxious to be tried promptly and with expedition. This includes the assumption, in those cases where the accused and counsel have agreed to a trial at the first available date, that the accused desired to be tried earlier.

In matters related to the conduct of the accused or his counsel for the purpose of s. 11 *b*), s. 162 if the *National Defence Act* has no effect. I fully endorse the remarks made by the Manitoba Court of Appeal in *R. v. Barkman*, (2004) 189 C.C.C. (3d) 257, at paragraphs 34 to 38, as they apply without restriction at proceedings under the Code of Service Discipline:

> 34 The test as to whether the accused waived the period of delay is very strict. It must be clear and unequivocal. See *Morin*, at p. 790, and P. W. Hogg, *Constitutional Law of Canada*, looseleaf (Carswell), vol. 2, sec. 49.7, p. 49-8. But for our purposes it matters not whether defence counsel''s agreement for later trial dates amounts to waiver, actions of the accused, or simply an indication of an absence of prejudice; whichever it may be, the agreement stops the running of the clock against the breach of the accused''s constitutional rights to be tried within a reasonable period of time. See *R. v. Allen* 1996 CanLII 4011 (ON C.A.), (1996), 110 C.C.C. (3d) 331 (Ont.C.A.), and *R. v. Chatwell* 1998 CanLII 3560 (ON C.A.), (1998), 122 C.C.C. (3d) 162 (Ont.C.A.), leave to appeal to the Supreme Court refused, without reasons (October 5, 1998), which confirm that accommodating the needs of defence counsel counts against the defence when calculating delay under sec. 11(b) of the *Charter*.
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> 35 See as well *R. v. Kwok* 2002 BCCA 177 (CanLII), (2002), 164 C.C.C. (3d) 182, 2002 BCCA 177, at para. 21, where the court held the "Crown is not …… responsible for delay created by defence counsel''s calendar," even though the rescheduling was made necessary by the Crown''s failure to disclose in a timely manner.
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> 36 While the accused''s desire to be represented by counsel of their choice is both understandable and is supported by authority, there are other interests that need to be taken into account as well. As the trial judge put it so aptly, "there must be a reasonable balance." The right to counsel is but one of the factors to be considered in achieving this "balance"" and cannot be used to "trump" other competing rights and interests under sec. 11(b).

In consequence, the delay between May 2007 and August 2007 as a result of the direct conduct of the applicant's counsel entering into an agreement as to the date of trial stopped the running of the clock against the breach of the accused's constitutional rights to be tried within a reasonable period of time.

[27] As to the actions by the prosecution, the evidence indicates that approximately two months after the charges were laid, that is on 7 June 2006, Lieutenant-Colonel Peachey informed Corporal Gibbons that he had decided to refer the matter to Commander Land Forces Western Area with a recommendation for trial by court martial. On 14 June 2006, the commanding officer sent the referral letter to

Commander Land Forces Western Area that was received at Headquarters Land Forces Western Area on 19 June 2006 and, following review by the Office the Judge Advocate General (Western Region), was returned to Lieutenant-Colonel Peachey with a request for further information. The evidence also indicates that it is not before October 2006 that Lieutenant-Colonel Peachey could put his mind to the request to provide the additional information requested. On 28 November 2006, Lieutenant-Colonel Peachey finally sent a second letter to Commander Land Forces Western Area providing the additional information as requested. On 17 January 2007, following advice provided by the Judge Advocate General Western Region, Major-General Skidmore, the Commander Land Forces Western Area, referred the file to the Director of Military Prosecutions. The file was received in Ottawa on 25 January 2007. Despite the explanations provided by Lieutenant-Colonel Peachey with regard to his busy schedule, his multi-unit commanding officer responsibilities, the de facto cessation of activities of the unit during the summer period, as well as the problems encountered for not having, for all intents and purposes, a full-time staffing officer able to assist him in this matter, the court concludes that the delay between June and November 2006, a delay of five months, is unreasonable in the circumstances over the inherent time requirements for a case of this nature. The delay starting in December 2006 until May 2007 is reasonable in light of the totality of the circumstances including the actions by the prosecution to move the file forward despite a clear absence of activities with regard to that file from the Director of Defence Counsel Services, despite the written request by Corporal Gibbons in accordance with the regulations to be represented by counsel from the Directorate of Defence Counsel Services.

[28] On the issue of limits on institutional resources in this case, there is no evidence that it could have played any role in contributing to the delay. Although the court can conceive that insufficient resources at the Director of Defence Counsel Services may impact on his duties to fulfill its statutory mandate pursuant to s. 249.19 of the *National Defence Act*, and thus could be counted against the prosecution in very rare cases, this is simply not one of them. There is no evidence that the Director of Defence Counsel Services could not have appointed counsel at an earlier date. The only inference that the court can make is that the director, or counsel on his behalf, did not inform Corporal Gibbons further to his request of 7 June 2006, that he could not accept the applicant's demand. In my view, only a prompt response by the Director of Defence Counsel Services informing an accused person that he or she cannot be represented by a counsel from the Directorate of Defence Counsel Services, or that he cannot engage on a temporary basis the services of counsel to assist the Director of Defence Counsel Services pursuant to subsection 249.21(2) of the *National Defence Act*, would support an argument that would include the unavailability of counsel provided pursuant to Division 12 of Part III of the *Act* to amount to limits on institutional resources. The corollary would also require the Director of Defence Counsel Services who acts under the general supervision of the Judge Advocate General—who has the superintendence of the administration of military justice in the Canadian Forces pursuant to s. 9.2 of the

Act—to inform him of this situation as expeditiously as the circumstances would permit.

[29] Upon review of the evidence, the court does not see any other reasons for delay. As to the prejudice of the accused, the court examined this issue taking into account that the delay starting in May 2007 until today is attributable to the accused and must be considered in the analysis of the prejudice alleged by the accused. Therefore the overall delay is 12 months. In the circumstances of this case, such a delay does not give rise to an irrebuttable presumption of prejudice, even if it is at the higher end of what can be considered reasonable in the circumstances. The evidence before the court does not establish on a balance of probabilities that the applicant suffered prejudice as a result of the delay or flowing from the delay. The evidence introduced by the accused does not demonstrate a prejudice caused to him other than the ordinary stress and anxiety associated with the fact of facing criminal charges. That is not to say that the stress and anxiety that he had to face in the last two years are not real. They are just not flowing from the delay related to the proceedings before this court. The accused testified that the comments and insinuations about the incident of November 2005 faded after six months. In other words, the questioning by his co-workers terminated before the charges were laid in April 2006. This is not a situation that one could qualify as lasting longer that was necessary or should have been necessary in the circumstances of a case of this nature.

[30] With regard to the stigmatization and difficulties he encountered in the workplace and for the treatment Corporal Gibbons has received by other superiors in the unit, as described by Corporal Gibbons and his supervisor, the evidence as a whole demonstrates that he deserved the criticism of other superiors because his conduct was deficient. It is clear for the court that Sergeant Williams had lost all objectivity with regard to the work and performance of Corporal Gibbons. This is inevitable when one considers the fact that the applicant was the only subordinate of Sergeant Williams for most of the period. His performance and attitude had faded, but this is consistent with the stress and anxiety which caused him some health concerns, and the court does not question the fact that there was real health issues but they are equally consistent when they are associated with the other criminal charges he was facing on two different incidents, including one that is yet to be resolved. The Personnel Evaluation Report that he received was also fair and reflected his level of competence and potential for his rank. Whether someone had viewed his performance at a lower level than Sergeant Williams did see it, was later rectified. As I said, in fairness, the court believes that the level of stress and anxiety suffered by Corporal Gibbons is real and it had an impact on his health, however, this situation is not attributable to the delay in these proceedings; or if it is, it would be minimally. The applicant further testified that he had to terminate his class "B" service contract based on the advice given to him by his supervisor, Williams. Again, this decision was a conscious decision even if it was based on erroneous information and the fact that his contract had already been renewed in 2006,

despite the pending charges against him. I refer to the testimony of Major Hrycyna, a credible and reliable witness on that issue. At the very least, Corporal Gibbons could have enquired with his chain of command further to his discussion with Sergeant Williams as to the prospect of renewal in light of the pending disciplinary charges. Moreover, Corporal Gibbons was able to secure a more lucrative employment as a result, where he now makes several hundred dollars more than previously on class "B" reserve service.

[31] Corporal Gibbons testified that he made inquiries with Sergeant Williams on two or three occasions in September 2006 as to the progress of the disciplinary proceedings against him with no success. Such a timid inquiry is not indicative of someone who wants to assert his right to a speedy trial, but it is more consistent with someone who is fairly content with the pace with which things were proceeding. However, there is absolutely no evidence before the court that would reasonably explain why Corporal Gibbons was not contacted by anyone from the Directorate of Defence Counsel Service despite his initial request made and forwarded to the said directorate on 7 June 2006 where he chose to be represented by defence counsel appointed by the Director of Defence Counsel Services. Based on the evidence before the court, the only contact made with his counsel was made when Lieutenant(N) Létourneau assumed his duties in May 2007. It is illogical and unacceptable, without a reasonable explanation that is not present in this case, that a person who has chosen to be represented by counsel under the special legal aid regime provided in Chapter 101 of the Queen's Regulations and Orders for the Canadian Forces, receives no answer to his request and be provided with a point of contact pending the appointment of counsel as the case may be for a period in excess of 11 months. Who better than the accused's legal counsel to act further to his inquiry as to the status of disciplinary proceedings? How can someone justify that an accused person be almost one full year without any contact with a legal counsel from Defence Counsel Services where that person could truly and effectively indicate his wishes to expedite the matter as the case may be? I have no answer to those questions, but, in my view, those are legitimate questions.

[32] Should the accused had established actual prejudice, it would have been required to be of such a degree that it would outweigh the Canadian Forces' and the society's interests in prosecuting the charges before the court. It is clear that considering the seriousness of the charges, the fact that it allegedly took place in civil premises on Remembrance Day, in military uniform, after the acceptance by the owner of the premises to welcome members of the unit, it is important for the military community and the local community here in Regina that Corporal Gibbons be brought to court martial. On the other hand, it has not been proven that the security or the fairness of the trial of the accused, his liberty not being at stake, was affected in the context of a breach of section 11 *b*) of the *Charter*. In the absence of any prejudice or even minimal prejudice and considering that the delay to proceed with this court martial is not unreasonable in the totality of the circumstances, this court concludes that the accused

has not proven, on a balance of probabilities, an infringement of his right to be tried within a reasonable time.

[33] Therefore, the application made by the accused under section 11 *b*) of the *Charter* is dismissed.

COLONEL M. DUTIL, C.M.J.

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