COURT MARTIAL

Citation: *R. v. Semrau*, 2010 CM 1005

Date: 20100201
Docket: 200945

General Court Martial

Asticou Centre courtroom
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Captain R.A. Semrau, Applicant

Before: Colonel M. Dutil, C.M.J.

DECISION FURTHER TO AN APPLICATION ALLEGING A VIOLATION OF THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME PURSUANT TO SECTION 11(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

(Orally)

INTRODUCTION

[1] This is the decision of the Court with regard to an application alleging a violation of the right to be tried within a reasonable time pursuant to section 11(*b*) of the *Canadian Charter of Rights and Freedoms*(*Charter*).

[2] The applicant is charged with four offences under the *National Defence Act*, two of which are contrary to the *Criminal Code.* The first charge relates to the offence of second degree murder contrary to subsection 235(1) of the *Criminal Code*, whereas the second charge refers to the offence of attempt to commit murder using a firearm contrary to paragraph 239(1)(a.1) of the *Code*. The applicant is also charged with section 93 of the *National Defence Act* for disgraceful conduct, and under section 124 of the said *Act* for negligent performance of duties. These charges arose during an alleged event in

Helmand Province, Afghanistan, that would have occurred on 19 October 2008. It is alleged that the accused would have committed a murder upon an unnamed male person or attempted murder on an unnamed male person by shooting. The particulars of the third charge allege that the accused did shoot an unarmed and wounded male person while acting as the commander C/S 72A Operational Mentoring Liaison Team, OMLT, whereas the fourth charge alleges that the accused failed to comply with the code of conduct for Canadian Forces personnel in that he failed to collect a wounded male person and provide him with the treatment required by his condition as it was his duty to do so.

[3] By written notice of application prior to plea, Captain Semrau asked the court to order a stay of proceedings pursuant to section 24(1) for an alleged violation of his rights under section 11(*b*) of the *Canadian Charter of Rights and Freedoms* to be tried within a reasonable time.

THE EVIDENCE

[4] The evidence before this court for this application consists of the following:

1. An agreed statement of facts, M4-4, and a table of events that provides;

    (a) on 19 October 2008 it is alleged that certain events occurred in Helmand Province, Republic of Afghanistan, which led to the present charges;

    (b) on 30 December 2008 the accused was arrested while "outside the wire" in Kandahar Province, Afghanistan, and charged with the offence of second degree murder contrary to the *National Defence Act;*

    (c) on 31 December 2008 a Record of Disciplinary Proceedings was signed;

    (d) on 3 January 2009 Captain Semrau was returned to Canadian Forces Base Petawawa;

    (e) on 7 January 2009 the accused was released from custody by military Judge, Lieutenant-Colonel L-V. d'Auteuil, on conditions; namely:

        (i) to remain under military authority;

        (ii) to remain within the confines of Canada;

(iii) to hand over any passport issued to him to the officer in command of the Military Police Detachment for CFB Petawawa;

(iv) to reside at 530 Mary Street, Pembroke, Province of Ontario;

(v) to notify the officer in command of the Military Police Detachment CFB Petawawa 48 hours in advance of any change of his residential address or land line phone number;

(vi) to abstain from communicating with certain named and unnamed witnesses; and

(vii) to abstain from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, and all such things, including in the course of his duties or his employment as a member of the Canadian Forces.

(f) on 17 September 2009 a charge sheet setting out the initial charge of murder, and three additional charges pursuant to the *Criminal Code of Canada* and the *National Defence Act*, was signed by the Director of Military Prosecutions;

(g) on 22 September 2009 defence counsel wrote to the prosecution requesting trial dates commencing on 9 December 2009 or 10 January 2010;

(h) on 1 October 2009 the Chief Military Judge assigned Lieutenant-Colonel d'Auteuil, a military judge, to conduct pretrial conferences;

(i) these conferences were held on 22 October 2009, 18 November 2009, and 3 December 2009;

(j) on 12 November 2009 the prosecution provided the "will-say" pursuant to QR&O 111.11;

(k) on 29 November 2008 the prosecution advised that the disclosure process had been completed;

(l) on or about 17 December 2009 the General Court Martial in this matter was convened and scheduled to proceed on 25 January 2010;

(m) the Crown did not object to the release of Captain Semrau;

(n) the defence has made no application to vary the release conditions;

(o) on 24 September 2009 defence proposed a trial date to the prosecution in those terms:"We hope to schedule the trial for either December '09 to January '10, or for January '10 to February '10;

(p) as an infantry officer, the applicant has not been employed while in many positions where it is necessary to use weapons and explosives and ammunition. He has also been limited in training opportunities and career courses as:

(i) CSOR/JTF2 tryouts, rifle company 2i/c, Lav captain or platoon commander positions;

(ii) Ops O, Assistant Ops O, TO, UEO, Int O, Plans O, Trg O, assistant adjutant;

(iii) advance recce course, recce platoon commander;

(iv) executive assistant to the commanders;

(v) Australia army small arms competition team leader;

(vi) OMLT positions;

(vii) P-OMLT positions;

(viii) PRT positions;

(ix) C-IED positions; and

(x) duty officer positions.

Secondly, the table of dates and events reads as follows:

DATE	**EVENT**	**DELAY**
19 Oct 08	Incident	2 months, 12 days (73 days)
	Total:	2 months, 12 days (73 days)
30 Dec 08	Arrest of Applicant	
7 Jan 09	Release of Applicant	7 days
14 Apr 09	Charges Referral (QR&O s. 109.03)	3 months, 13 days (103 days)

22 Apr 09	Application for Disposal of Charge (QR&O s. 109.03)	18 days
27 May 09	Application for Referral of Charge (QR&O s. 109.05)	1 month, 5 days
11 Jun 09	Initial Disclosure to Counsel	15 days
19 Jun 09	Further Disclosure to Counsel	8 days
17 Sept 09	Further Disclosure to Counsel	2 months, 29 days (90 days)
17 Sept 09	Charge Sheet Preferred	2 months, 29 days (90 days)
14 Oct 09	Further disclosure to Counsel	27 days
22 Oct 09	Pre-trial Conference	8 days
2 Nov 09	Further disclosure Counsel	11 days
4 Nov 09	Further Disclosure to Counsel	2 days
12 Nov 09	Will Say Statement (QR&O s. 111.11(1))	10 days
3 Dec 09	Conference Call Pre-Trial	21 days
16 Dec 09	Further Disclosure to Counsel	13 days
	Total:	11 months, 16 days (351 days)
17 Dec 09	Convening Order	
5 Jan 10	Further Disclosure to Counsel	19 days
8 Jan 10	Judicial Pre-Trial Conference	3 days
25 Jan 10	Court Martial Commences	17 days
29 Jan 10	s. 11(b) Motion	5 days
	Total:	1 month, 12 days (43 days)
	Total Delay:	1 year, 1 month (396 days)

2. The evidence is completed by a JAG policy directive dated 30 March 2001 issued by to the Director of Military Prosecutions and the Director of Defence Counsel in respect of the delay in the court martial process, (M4-5);

3. A document entitled "Court Martial Policy" issued by the Court Martial Administrator on 31 August 2006, (M4-6),which is no longer in force, see the applicant's written submissions at paragraph 17;

4. A letter dated 22 September 2009 from counsel for the applicant to the Deputy Director of Military Prosecutions entitled "Trial Scheduling," (M4-7); and,

5. The facts and matters that the court has already taken judicial notice under s. 15 of the Military Rules of Evidence.

POSITION OF THE PARTIES

The Applicant

[5] The applicant submits that his right to a trial within a reasonable time, as guaranteed by section 11(*b*) of the *Charter*, has been violated. He argues that the delay in bringing this matter to trial is excessive and unreasonable in the circumstances.

[6] Counsel for the applicant submits that the right to be tried in a reasonable time is particularly critical in the context of military justice. He argues that the importance of a speedy trial cannot be overemphasized to the extent that it was recognized in *R. v. Généreux*, [1992] 17 C.C.C. (3d) 1, where the late-Chief Justice Lamer for the majority stated at paragraph 60:

> ... To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs....

[7] It is agreed by the parties that in the military justice system the start of the period of the delay for the purposes of an analysis under s. 11(*b*) of the *Charter* corresponds to the laying of the laying of the charge on a Record of Disciplinary Proceedings signed by a person who has authority to do so.[1]

[8] The applicant submits that applying the factors set out by the Supreme Court of Canada in *R. v. Morin*, [1992] 1 S.C.R. 771, the court should conclude that the delay to bring this matter to trial is *prima facie* unreasonable. In support of his argument, he points to the date of the offences that are alleged to have been committed on the 19th day of October, 2008. He states that the prosecution advised that the disclosure process had been completed only on 24 November 2009. Counsel for the applicant further submits that it took more than four months after the charges were preferred, 17 September 2009, before even the pretrial applications are commenced.

[9] According to the defence, this delay is *prima facie* unreasonable and puts the onus on the prosecution to explain and justify why it took so long to bring Captain Semrau to trial. The defence submits that the circumstances of this case do not justify such a long delay. He argues that there is no evidence that this is a complex case and that the seriousness of the charges does not, *per se*, enhance complexity. The applicant states that he did not expressly or implicitly waive any time period, more specifically, any part of the 12-month period from 30 December '08 to 25 January '10.

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[1] See QR&O 105.015

[10] The applicant submits that the period of delay cannot be justified satisfactorily by the prosecution. He suggests that despite the seriousness of the offences, prosecution should have been ready to schedule the trial on 17 September 2009 when the charge was preferred. Although disclosure was not complete until 24 November 2009, he argues that the pretrial applications could have commenced much earlier than 25 January 2010. Counsel for the applicant relies on Exhibits M4-4 and M4-7 in support of his view.

[11] The applicant submits that there is no evidence that can point in his direction to have caused or contributed to the delay in bringing this matter to trial, but he blames the prosecution to what he refers to as an unexplained delay of 11 months from 30 December 2008 to 24 November 2009 before the prosecution advised that the disclosure process had been completed. There is also an unexplained three-month period from 17 September '09 to 17 December '09 before the General Court Martial set a date for pretrial applications.

[12] Citing *Morin*, which clearly stated that this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them, the applicant argues that on 22 September 2009 the defence counsel wrote to the prosecution and hoped to schedule the trial for either 9 December 2009 or 10 January 2010, as well as resolving various outstanding issues over the next few weeks. He suggests that on 17 December 2009 the Court Martial Administrator set the date of the pretrial application for 25 January 2010 after three pretrial conferences held on 22 October 2009, 18 November 2009, and 3 December 2009. However, the evidence before the court is that the court martial was convened to commence on 25 January 2010, (Exhibit 1).

[13] The applicant submits that it took more than 12 months for the system to make all arrangements for the pretrial applications and the trial. He argues that the length of that period raises some concerns about the government's intent to allocate sufficient resources to the military justice system. Finally, the applicant does not see any other reasons that would have contributed to delay.

[14] The applicant submits that he has suffered prejudice to his right to security and his right to a fair trial by reasons of the unreasonableness of the delay. First, he submits that the release conditions imposed on him by a military judge on 7 January 2009 were significant. Second, he argues that as an infantry officer he has not been employable in many positions where it is necessary to use weapons, explosives, and ammunition. He has also been limited in training opportunities and career courses. Therefore, the applicant asks the court to order a stay of proceedings as the only available remedy in the circumstances.

The Respondent

[15] Counsel for the respondent submits that the onus to establish a violation of s. 11(*b*) of the *Charter* lies on the applicant. He submits that the law has recognized that

as the seriousness of the offence increases, so does the societal demand that the accused be brought to trial. The respondent submits that s. 162 of the *National Defence Act* does not enhance the right of a person accused under the Code of Service Discipline under s. 11(*b*) of the *Charter*. According to the respondent, s. 162 of the *Act* does not shorten the period of reasonableness or alter the calculus for its determination, it simply restates that reasonableness or expeditiousness depends on the circumstances.

[16] The respondent does not concede that the delay is *prima facie* unreasonable to warrant this court to embark on the analysis into the delay between arrest and the commencement of the court martial, when considering the following:

1. the seriousness of the offence;

2. the complexity of investigation with regard to:

    (i) operational theatre;

    (ii) geographic distance;

    (iii) nature and location of witnesses; and

    (iv) complexity of evidence; and

3. nature and scope of disclosure.

[17] Counsel for the respondent does not dispute that the applicable factors to apply in this matter were set in *R. v. Morin* and that they apply to courts martial in Canada. He submits that the societal value of conducting this court martial clearly outweighs any real or presumed prejudice occasioned by this delay, particularly in light of the minimum infringement on the applicant's liberty interest, a complete absence of any concern expressed by the applicant as to the progress of this matter, and the complexity and nature of the allegations.

[18] The respondent strongly argues that it is well-settled law that a court should undertake an inquiry in respect of an alleged violation of s. 11(*b*) only where the overall delay is sufficient to raise an issue as to its reasonableness. If the delay is unreasonable or unexceptional, no inquiry is warranted unless the accused can raise the issue by reference to other factors, say, prejudice. The length of delay must be assessed from the date the person is charged with an offence until the date the trial is competed. He further submits that if the entire time period is not unreasonable when assessed according to the governing principles, no violation of s. 11(*b*) of the *Charter* occurs, even if one or more individual portions of that entire time, viewed in isolation, might appear unreasonable or excessive.

[19] Counsel for the respondent submits that this case involves the most serious offence proscribed by the laws of Canada, murder. It was allegedly committed by a Ca-

nadian officer in a war zone. He advances that the complexity of any charge of murder is compounded with the additional allegation that the applicant conducted himself in a disgraceful manner and further that he negligently performed a military duty.

[20] The respondent submits that in *R. v. Mills*, [2009] C.M.A.J. No. 6, the Court Martial Appeal Court upheld the trial judge's ruling that 12 months in excess of what is considered reasonable for an "in-theatre" event was not unreasonable. He further argues that this recent decision implicitly recognizes that some allowance must be made for investigation and prosecutions arising from an operational context given the reality of such matters. This should not condone unreasonable periods of time, nor less dedicated investigators of prosecutors, but should provide a realistic appraisal of the circumstances of the prosecution.

[21] With regard to a waiver by the applicant to any period of delay, the respondent acknowledged that the applicant has not expressly waived any time in the 392 days between charge and commencement of this court martial, but, while acknowledging that it is the prosecution's responsibility to bring any accused to court martial, he argues that neither has the applicant expressed any concern about the pace of these proceedings until his letter September 22, 2009, he submits that the action of the applicant belies any real desire to have this matter proceed more expeditiously.

[22] Despite its submission that the delay is not sufficient to cause an inquiry by this court, the respondent submits that every case has inherent time requirements that vary according to the nature of the case. He suggests that the more complicated a case, the longer it will take for the prosecution to disclose its case to counsel and for counsel to prepare. Additionally, whenever criminal proceedings are instituted there are always a number of preliminary matters such as the retaining of counsel, disclosure, judicial interim release hearings (show cause hearings), which must be considered. All these preliminary "intake" proceedings take time. He argues that courts have consistently recognized that these preliminary matters are an integral and necessary component of the inherent time requirements of any case and are to be viewed as neutral as they are not accurately attributed to any party. He advances that courts have considered that a reasonable neutral period for such "intake" matters typically varies between two months and nine months depending on the nature of the case and the "intake" functions to be completed. These "intake" periods should be considered as neutral. He suggests that Chapters 107, 109, and 110 of the QR&Os set out certain administrative procedures respecting the referral of charges laid under the Code of Service Discipline. He concedes that without an evidentiary foundation these additional requirements cannot extend the inherent time requirements of a military justice prosecution.

[23] The respondent asked the court to conclude, based on the evidence adduced in this application, to the absence of prejudice on the applicant. Although the applicant was held in pretrial custody for seven days, he was released by a military judge on consent. He points out to the offence with which the applicant stands charged as being one where a person is required to show cause for before release. Counsel for the respondent submits that the applicant was released on an undertaking with, arguably, routine condi-

tions that were not overly burdensome. The respondent further argues that the applicant has not sought to vary or delete any of those conditions, and he adds that the applicant continues to serve in the Canadian Forces with all the necessary benefits.

[24] Counsel for the respondent submits that the applicant has not alleged any prejudice, i.e., anxiety, stress, stigmatization beyond the ordinary stress and anxiety associated with facing serious charges. He further submits that the passage of time from charge to court martial has not exacerbated this.

[25] The respondent submits that the military justice context does not require successive stressful and expensive court appearance where the applicant is not required to fund his defence, so the added anxiety of this burden is non-existent.

[26] The respondent submits that the applicant confuses prejudice stemming from the charge itself rather than prejudice arising from the delay. It is further submitted that the evidence before the court is insufficient to find prejudice inferred or real. Even if the court would conclude that such inferred prejudice exists, counsel for the respondent argues that the applicant took no steps to mitigate that prejudice.

DECISION

Legal Analysis

Introduction

[27] The applicable law dealing with the right to be tried within a reasonable time is not in dispute. The relevant provisions of the *Charter of Rights and Freedoms* relevant to the determination of this matter, are the following:

> **11.** Any person charged with an offence has the right
>
> ...
>
> *(b)* to be tried within reasonable time.
>
> **24(1)** Anyone whose rights and freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In the context of offences under Part III, Code of Service Discipline, of the *National Defence Act*, a recently amended[2] s. 162 of the *National Defence Act* imposes the following duty:

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

[2] 2008 c.29, s.3

[28] It is recognized that the primary purpose of s. 11(*b*) of the *Charter* and the guarantee to be tried within a reasonable time is to minimize the adverse effect on the accused resulting from the pending disposition of an unresolved criminal charge. The focus of the guarantee is to "protect the accused from impairment or prejudice resulting from delay in processing or disposing of the charges" and not to protect the accused from impairment or prejudice arising from the fact that he has been charged. The primary purpose focuses on the protection of the individual rights of the accused. These rights are (1) the right to security of the person, (2) the right to liberty; and (3) the right to a fair trial.[3] The secondary purpose of s. 11(*b*) is societal in nature and has a dual dimension. Society has a collective interest in ensuring that those who transgress the law are brought to trial quickly and are dealt with according to the law. Society has also an interest in ensuring that individuals on trial are treated fairly and justly.[4] As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial.[5]

[29] In *Morin*, Sopinka J. explained that the right to security of the person is protected by seeking to minimize the anxiety, concern, and stigma of exposure to criminal proceedings where the right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pretrial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

[30] In *R. v .LeGresley*[6] the Court Martial Appeal Court approved the adoption of the factors adopted by the Supreme Court of Canada in *Morin* in the context of military justice. The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula, but rather by a judicial determination balancing the interests which this section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.[7] These factors are:

1. the length of the delay;

2. the waiver of time periods;

3. the reasons for delay which include:

    a. inherent time requirements of the case;

    b. actions of the accused;

    c. actions of the Crown;

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[3] see *R. v. Morin*, [1992] 1 S.C.R. 771
[4] see *R. v. Askov*, [1990] 2 S.C.R. 1991, and *R. v. Conway*, [1989] 1 S.C.R. 659
[5] see *R. v. Morin* at para 30
[6] 77 W.C.B. (2d) 369, confirmed in *R. v. Mills*, [2009] C.M.A.J. 6
[7] See *R. v. Morin* at para 31

d. limits on institutional resources; and,

e. other reasons for delay; and

4. prejudice to the accused.

[31] The court should undertake an inquiry in respect of an alleged violation of s. 11(*b*) only where the overall delay is sufficient to raise an issue as to its reasonableness. If the delay is unreasonable or unexceptional, no inquiry is warranted unless the accused can raise the issue by reference to other factors. The length of the delay must be assessed from the date the person "is charged with an offence" until the date the trial is completed. In *R. v. Shertzer*[8] the Ontario Court of Appeal restated the approach to be followed when making the assessment of the overall delay:

> **[122]** As L'Heureux-Dubé explained in *R .v .Conway*, [1989] 1 S.C.R. 1659, at page 1674, the court must evaluate the reasonableness of the overall delay and not simply focus on individual time periods when assessing a claim under s. 11(*b*). Arbour, J.A., made a similar point in *R. v. Bennett*, (1991) 3 O.R. (3d) 193, (CA), at page 211, aff'd in [1992] 2 S.C.R. 168, where she observed that "[i]t is easy to loose sight of the importance of the total period of delay" and that "[u]ltimately, it is the reasonableness of the total period of time that has to be assessed in light of the reasons that explain its constituent parts."

The length of the delay

[32] The accused was charged with murder on 31 December 2008 in a Record of Disciplinary Proceedings for certain events that would have occurred in Helmand Province, Republic of Afghanistan, on or about 19 October 2008. On 3 January 2009 Captain Semrau was returned to CFB Petawawa.

[33] On 7 January 2009 the accused was released from custody by Military Judge L-V. d'Auteuil on conditions that I have expressed previously.

[34] Between 14 April 2009 to 27 May 2009 the initial charges were referred to a referral authority and ultimately referred to the Director of Military Prosecutions. On 11 and 19 June 2009 initial and additional disclosure was provided to defence counsel. On 17 September 2009 a charge sheet setting out the initial charge of murder and three additional charges pursuant to the *Criminal Code of Canada* and the *National Defence Act* was signed by the Director of Military Prosecutions and additional disclosure was provided to defence counsel. On 22 September 2009 defence counsel wrote to the prosecution hoping that trial dates commence on 9 December 2009 or 10 January 2010. On 14 October 2009 additional disclosure is provided to defence counsel. On 1 October 2009 the Chief Military Judge assigned the military judge Lieutenant-Colonel d'Auteuil to conduct pre-trial conferences. Three conferences were held on 22 October 2009, 18 November 2009, and 3 December 2009. On 2 and 4 November 2009 counsel for the de-

[8] 248 C.C.C. (3d) 270, at para 122

fence received additional disclosure. On 12 November 2009 the prosecution notified the defence of the witnesses it proposed to call and the purpose for which each witness was called as well as the nature of the proposed evidence of the witness. On 24 November 2009 the prosecution advised that the disclosure process had been completed. On or about 17 December 2009 the General Court Martial in this matter was convened and scheduled to proceed on 25 January 2010. On 5 January 2010 the prosecution provided more disclosure to the defence. On 8 January 2010 the judge assigned to preside at this court martial held a pretrial conference. Finally, the proceedings of this court martial have commenced on 25 January 2010.

[35] In considering the total of the delay, this court considers that it elapses from 31 December 2008 to the beginning of the proceedings of the court martial, 25 January 2010, to 21 January 2010, that corresponds to the hearing of this application. As the length of the delay must be assessed from the date the person "is charged with an offence" until the date the trial is completed, it is reasonable that this trial would require an additional period between three to five months, including three to six weeks for pretrial applications by the accused. Although it requires the court to speculate somewhat in trying to assess when this trial will be completed, the evidence before the court clearly points to the most serious offence that would have been committed in Afghanistan. The court has already been seized with an application made by the accused last week to have the entire proceedings in Afghanistan. At a judicial pretrial conference held on 8 December 2009, in the presence of counsel, it was openly discussed that the case for the prosecution would require several witnesses located in Canada as well as others outside of the country. Taking into consideration at this stage the nature and the seriousness of the offences charged, the circumstances during which they have allegedly been committed based on the particulars of the said charges, and the inherent logistical and geographical requirements to manage this trial, it is reasonable that the total length of the delay could be approximately 18 months, potentially to the end of June 2010. In the circumstances is such delay exceptional to warrant an inquiry into the delay? In my view, the court believes that the delay to bring this matter to trial is *prima facie* unreasonable.

Waiver of the time period

[36] The respondent acknowledged that applicant has not expressly waived any time in the 392 days between charge and commencement of this court martial, but, while acknowledging that it is the prosecution's responsibility to bring any accused to court martial, he argued that neither has the applicant expressed any concern about the pace of the proceeding until his letter of 22 September 2009. He submits that the action of the applicant belies any real desire to have this matter proceed more expeditiously. The court finds that the evidence does not support any inference that the applicant has waived any period of delay.

Reasons for the Delay

[37] After having considered the first two factors of the *Morin* analysis, I will now assess the reasons for delay, including the inherent time requirements for the case, the actions of the prosecution, the actions of the accused, and the limits on the institutional resources to bring this matter to trial.

Inherent time requirements

[38] It is understood that there will always be inherent time requirements which inevitably lead to delay. These periods include the time required to prepare and process the case as well as the intake procedures such as pretrial custody review hearing and disclosure. It is also recognized that complex cases require more time to prepare.

[39] Despite the pretentions of the applicant, the evidence points objectively to a relative complexity in bringing this matter to trial. This case refers to very serious offences committed in Helmand Province, Afghanistan. The alleged incidents would have occurred outside the wire. That alone enhances the complexity of the investigation and the preparation of the case by the parties. This is not an incident that would have taken place in the confines of Kandahar Airfield where the resources are mostly located. The court has already been seized with an application made by the accused last week to have the entire proceedings in Afghanistan. At a judicial pretrial conference held on 8 December 2009, in the presence of counsel, it was openly discussed that the case for the prosecution would require several witnesses located in Canada as well as others outside of the country. Taking into consideration the nature and the seriousness of the offences charged, the circumstances during which they have allegedly been committed based on the particulars of the said charges, and the inherent logistical and geographical requirements to manage this trial, the court concludes that this matter is more complex than the routine court martial held in Canada.

[40] It is generally accepted that the inherent time requirements to bring matters to trial in the military justice system may vary between four to six months for simple cases and slightly more for complex matters. In the context of this case, I consider that this case should be at the higher end of the spectrum. This amount of time is neutral and it does not count against the parties. The applicant submitted that the prosecution should have been ready to schedule the trial in mid-September 2009, that is approximately nine and one-half months after the laying of the charge. I find that the seriousness and complexity of this matter would have required nine months to bring this matter to trial. In a sense, the court is less generous than counsel for the applicant. This period would include the period between 31 December 2008 until 7 January 2009, used to repatriate Captain Semrau and release him under conditions at a pretrial custody review hearing.
Actions of the applicant

[41] This aspect of the analysis includes all the voluntary actions by the applicant to date. This does not serve to assign blame. In this topic, the court considers that the following events must be included:

1. the application attacking the validity of the military dress at courts martial, (2 days);

2. the application to have summons issued to potential witnesses with regard to an application to quash the convening order on the basis that the court should have been convened to take place in Afghanistan, (2 hours);

3. the application to quash the convening order on the basis that the court should have been convened to take place in Afghanistan, (2 days);

4. the request to review trial tactics and adjournment on 28 January 2010, (.25 days);

5. the application challenging the judicial independence of military judges presiding at courts martial, (1.5 days);

6. anticipated application by the accused challenging the constitutionality of selection process of panel members at courts martial, (applicant's estimation of time 3 days);

7. notice of application to have summons issued to potential witnesses with regard to application by the accused challenging the constitutionality of selection process of panel members at courts martial, (applicant's estimation of time 1 day); and,

8. anticipated application by the accused challenging the constitutionality of the sentencing regime under the *National Defence Act*, (applicant's estimation of time one half day).

[42] The applicant submitted that the letter M4-7, sent to the prosecution on 22 September 2009; that is, five days after the date of preferral of charges, indicates clearly that he wanted to have his trial scheduled at the earliest available date. He referred to paragraph 3 of the letter that states:

> "We hope to schedule the trial for either December '09 to January '10 or for January '10 to February '10. Perhaps we can set trial dates at the next coordinating teleconference on 24 September 2009 and resolve the various outstanding issues over the next few weeks."

[43] The effect of this letter must be put in a proper context, it is abundantly clear that the disclosure process was not complete in September 2009. There is no evidence that counsel for both parties did participate in a coordinating teleconference on 24 September 2009 to set a date. However, the Chief Military Judge assigned a military judge to case manage this trial as early as 1 October 2009. Three conferences were held, 22 October 2009, 18 November 2009, and 3 December 2009. Although there is no evi-

dence of what transpired in these pretrial management conferences, one would only expect that issues such as outstanding disclosure, outstanding issues, resolution of issues, potential admissions, the filing of notice of applications, applications, factums, evidence on which applications and the order of applications would proceed before the trial judge or another judge, and discussion with regard to potential interpreters, if required, would take place.

[44] The record indicates that the applicant did not provide notice of his applications before 5 January 2010 and did not seek an earlier date of trial after September 2009. I can only conclude that both the applicant and the respondent were satisfied with the pace of the proceedings and that they were participating actively to the pretrial management process.

[45] In conclusion, the court can already attribute approximately 10 days of the overall length of the delay that would be assessed towards the actions of the accused as a result of the applications heard so far at the court martial. The applicant suggested that the pretrial applications could take as much as six weeks. It appears slightly excessive, an estimated period of one month to deal with all applications may be more reasonable. Finally, the relevant evidence that I have just highlighted is sufficiently cogent to conclude that the applicant was mostly content with the pace of the proceedings.

Actions of the Prosecution

[46] The prosecution asserts in his written submissions that he expects to bring an application for commissioned evidence at a later stage. This matter was brought to the attention of the judge presiding this trial in the judicial pretrial conference held on 8 January 2010. It was agreed that this motion would be premature considering the notice of application of the accused to challenge the convening order and seek an order from the court to have the location of the trial changed to Afghanistan.

[47] Actions of the prosecution during the disclosure process falls within the ambit of this factor. It is recognized that the prosecution's obligation to disclose its case does not require that all disclosure be completed before the setting of the trial date. The record does not indicate that disclosure caused any significant concerns to the applicant after 22 September 2009.

[48] In light of my conclusion with regard to what constitutes reasonable inherent time requirements for a case of this seriousness and complexity, I will assign the period of delay after 1 September to 16 December 2009 to the prosecution in the category actions of the prosecution for practical purposes. This would amount to a period of 3.5 months.

Limits on Institutional Resources-Institutional Delay

[49] Although some allowance must be made for limited institutional resources, there is no evidence that this factor had any effect in bringing this matter to trial. It is consid-

ered that the dates between 17 December 2009, which corresponds to the convening order, to 25 January 2010; that is, the beginning of the proceedings of this court martial, must be applied to the limit of institutional resources; this delay includes 40 days.

Other reasons for delay

[50] The court sees no other reasons that would explain the delay. Therefore, the overall delay is expected to be approximately 18 months before the completion of this trial. Considering the inherent time requirements and the complexity of the case, I have concluded that this matter should have been set for trial after nine months from the laying of the charge. The actions of the accused so far and those expected until the end of this trial would require one month in light of the current notices of application. The actions of the prosecution have been estimated to 3.5 months, the limits on institutional resources amount to 1.5 months. Therefore, these figures can only take into account past events and upcoming proceedings until the end of February 2010.

[51] The period starting in March 2010 until late June 2010 would cover approximately four months. This period would reasonably include the trial, including judges instructions to the members of the court martial panel, various litegimate adjournments at the request of either party, the requirements to conduct the proceedings or part thereof in Afghanistan, and sentencing as the case may be. At this stage, the court can only divide this period equally to the inherent time requirements and limits on institutional resources. I therefore add those periods to the one that I mentioned previously; that four-month period would be addressed as neutral.

Prejudice

[52] In the circumstances of this case, the delay does not give rise to any refutable presumption of prejudice. Although the prosecution should have been ready to bring this matter to trial in September 2009, the evidence clearly indicates that the applicant was satisfied with the pace of the proceedings and that he would not have been ready to proceed in this matter before December '09 up to February 2010.

[53] The applicant led evidence with regard to prejudice pointing to the conditions of his release on conditions imposed by a military judge on 7 January 2009. The applicant submitted that these conditions caused him prejudice because he could no longer be employed advantageously as an infantry officer and this had an adverse impact on his career progression in the Canadian Forces. As an infantry officer, the applicant has not been employable in positions where it is necessary to use weapons, explosives, and ammunition. He has also been limited in training opportunities and career courses that were described in the evidence. However, the applicant suffered little or no prejudice for the delay. He was effectively released on routine conditions. Should he have required that his release conditions be modified for professional or personal reasons, he could have easily sought to have them reviewed judicially; he did not. The fact that he was not eligible to be employed in many positions where it is necessary to use weapons, explosives, and ammunition, as well as being limited in training opportunities and ca-

reer courses as a result of his release conditions, does not amount to real prejudice in itself. There is no evidence before the court that he was even considered to fulfill such positions or to attend at any of these courses or that his candidature was discarded as a result. There is no evidence that he has not been employed advantageously since being released on conditions in January 2009.

[54] Balancing the rights of the applicant under s. 11(*b*) of the *Charter* and the societal interest that those who are accused of crimes are brought to trial on their merits while being treated fairly and justly. This case alleges that an officer of the Canadian Forces has committed very serious criminal and military offences including murder in an operational theatre; namely, Afghanistan, on an unnamed male person during an incident that involved shooting. As it is recognized that as the seriousness of the offence increases so does the societal demand that the accused be brought to trial, the court is satisfied that this matter must proceed on the merits in respect of this application.

CONCLUSION

[55] For all these reasons, the application is dismissed.

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