

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20260325

Docket: CMAC-648

Citation: 2026 CMAC 3

**CORAM: GLEASON C.J.
DE MONTIGNY J.A.
CHARBONNEAU D.J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MAJOR (RETIRED) V.M.S. JACQUES

Respondent

Heard at Ottawa, Ontario, on December 8, 2025.

Judgment delivered at Ottawa, Ontario, on March 25, 2026.

REASONS FOR JUDGMENT BY:

GLEASON C.J.

CONCURRED IN BY:

**DE MONTIGNY J.A.
CHARBONNEAU D.J.A.**

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REASONS FOR JUDGMENT

GLEASON C.J.

[1] The prosecution appeals from the Order of the Acting Chief Military Judge D'Auteuil (the Military Judge) issued on November 25, 2024, in CM file 201971, ordering a stay of proceedings in six fraud and fraud-related charges levied against the respondent. In the November 25, 2024 Order, the Military Judge found that the respondent's right to be tried within

a reasonable time under section 11(b) of the Charter had been violated and accordingly stayed the charges.

[2] The respondent cross-appeals from an earlier Order of the Military Judge, issued on June 21, 2022, in the same file, dismissing an earlier motion for a stay of proceedings brought by the respondent. In the June 21, 2022 Order, the Military Judge found that the respondent's right to be tried within a reasonable time had not been violated.

[3] For the reasons that follow, I would dismiss both the appeal and the cross-appeal.

I. Background and the Orders Under Appeal

[4] While there were numerous pre-trial proceedings and adjournments before the Military Judge in this matter, only two periods are relevant to the appeal and cross-appeal: a period of 189 days from December 6, 2021 to June 13, 2022 in the cross-appeal and a period of 217 days from September 29, 2023 to May 3, 2024 in the appeal.

[5] The 189-day delay was caused by an adjournment following a change in the respondent's representation. This was required because her former counsel, a military lawyer from Defence Counsel Services, was removed from the file by the former Director of Defence Counsel Services (the DDCS) after the lawyer was ordered by the DDCS to refrain from maintaining a constitutional challenge that the respondent had raised and wished to pursue. The respondent then retained a civilian lawyer, which led to the need for the 189-day adjournment.

[6] In his reasons for the Order that is the subject of the cross-appeal, the Military Judge found that this delay, though not attributable to the defence, was nevertheless due to exceptional circumstances. Applying the method mandated by the decision of the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 [*Jordan*] for assessing whether a pre-trial delay violates an accused's rights under section 11(b) of the Charter, the Military Judge subtracted the 189 days from the time that had elapsed since the date the charges were laid, which brought the time between the date of charge to the anticipated end of the trial below the presumptive 18-month ceiling that the Military Judge found applicable. The Military Judge accordingly dismissed the respondent's application for a stay of proceedings and concluded that her right to be tried within a reasonable time under section 11(b) of the Charter had not been violated.

[7] The circumstances giving rise to the 217-day delay are more convoluted. The respondent brought several pre-trial applications. The one that gave rise to the 217-day delay arose from a challenge under sections 7, 11(d), and 11(f) of the Charter, pursuant to which the respondent alleged that the process for selecting the panel and the composition of the panel in a general court martial violated her right to a trial before an independent and impartial tribunal and a right she alleged she possessed to be tried by a panel more akin to a jury. In connection with that application, the respondent was granted permission to re-open her case to call the Court Martial Administrator (the CMA) to testify about the panel selection process, immediately after the respondent had closed her case. This happened when counsel for the prosecution advised that he did not intend to call the CMA to file documents regarding the panel selection process that the prosecution told the respondent it intended to file. As the respondent wished to have the

documents in evidence and wanted to question the CMA about them, she requested and was granted the right to re-open her case to call the CMA. The examination of the CMA took longer than expected, which led to the need to look for additional dates to complete the examination of the CMA and of another witness whom the respondent decided to call following the evidence that emerged through the examination of the CMA.

[8] On August 3, 2023, during a break in the examination of the CMA, the Military Judge broached with counsel for the parties the possibility of an adjournment of the scheduled trial dates (which were then projected to run from September 11 to 29, 2023, with the possibility of a shorter two-week trial also being discussed on August 3rd). The Military Judge suggested that the dates originally set for the trial be used to complete the evidence on the Charter challenge and to argue any other pre-trial applications. The Military Judge suggested several dates before the end of the 18-month ceiling (which would have been reached on January 30, 2024) to which the trial could be adjourned. Neither counsel objected to postponing the trial and using the September dates to complete all the pre-trial matters.

[9] The first of the dates canvassed by the Military Judge with the parties for the trial were three weeks commencing on November 6, 2023. Counsel for the defence was available on all but two of the suggested dates, but counsel for the prosecution was not available on any of them as he was scheduled to appear before another Court Martial in November. Counsel for the prosecution also advised the Military Judge that he was unavailable for the balance of November, in December 2023, and from January to March 2024, when he was scheduled to

appear before other Courts Martial. In short, counsel for the prosecution advised the Military Judge that he was not available until April of 2024.

[10] When the Military Judge inquired if counsel for the prosecution could be replaced by another prosecutor in any of these other files, counsel for the prosecution advised that the Canadian Military Prosecution Service was then short of lawyers capable of conducting proceedings in French so it might be difficult to find a replacement for him. Counsel for the respondent suggested that the lawyer, who was second chair for the prosecution in the respondent's case, could conduct the respondent's trial, but counsel for the prosecution advised he could not. The Military Judge then canvassed with counsel for the parties their availability for other dates, including ones for a trial commencing in January 2024. Counsel for the defence had availabilities, but counsel for the prosecution did not.

[11] The Military Judge adjourned the proceedings for lunch, and counsel for the prosecution verified if he could be freed up on the dates discussed. During the adjournment, counsel for the prosecution sent an email to the office of the CMA to advise that he could not be replaced and was unavailable on the dates discussed. When the hearing resumed, counsel for the defence advised that he had consulted with his client, and that she was likewise unavailable for the dates commencing in January 2024 because she was scheduled to give birth in February 2024. The Military Judge accordingly determined that the trial should be adjourned to April 15, 2024, which led to an anticipated end date of May 3, 2024. Thereafter, the office of the CMA sent a new convocation order for a trial commencing on April 15, 2024.

[12] In his reasons for the Order under appeal, the Military Judge conducted the analysis mandated by *Jordan* and held that the 217-day delay at issue was initiated and caused by the respondent's Charter challenge but that the respondent was not solely responsible for all of the 217 days of delay incurred because the trial would have taken place before the presumptive 18-month ceiling was exceeded if counsel for the prosecution had been available on the dates discussed. The Military Judge held as follows:

[TRANSLATION]

Accordingly, the delay that was incurred cannot be solely attributable to Major Jacques because it essentially stems from the refusal of counsel for the prosecution to adapt to the situation and to rearrange the availability of counsel from the Canadian Military Prosecution Service, which is under the responsibility of the Director of Military Prosecutions, between October 2024 and April 2025. Counsel for the prosecution provided no reasonable or satisfactory explanation to justify this situation. In other words, even though the reason for changing the trial date is solely attributable to Major Jacques, the main reason the trial could not go ahead until April 2024 is solely attributable to the refusal of the prosecution, which was allegedly unavailable until that time.

(Appeal Book, p. 1834)

[13] The Military Judge also held that a subsequent adjournment, granted to the respondent to pursue an application in Federal Court, was irrelevant because it post-dated the decision to adjourn the trial to dates commencing April 15, 2024, which already exceeded the applicable 18-month ceiling. The Military Judge further stated that the Federal Court proceedings were legitimate ones, and that the respondent had pursued them diligently.

II. The Prosecution's Arguments on the Appeal

[14] During the hearing before this Court, the prosecution raised several arguments in respect of the appeal. It first argued that the Military Judge made palpable and overriding errors in finding that: (a) the respondent was available in particular in November 2023 and January 2024 and that it was the inability to free up counsel for the prosecution that led to the 18-month ceiling being exceeded; (b) the Federal Court proceedings were legitimate ones; and (c) the respondent pursued the Federal Court proceedings diligently. The prosecution further submitted that the Military Judge erred in law by ignoring the many delays caused by the respondent after the August 3, 2023 adjournment, which the Military Judge was aware of by the time he issued the November 15, 2024 Order.

[15] In its Memorandum of Fact and Law, the prosecution in addition argued that the Military Judge erred by failing to attribute the 217-day delay entirely to the respondent because it was caused by her previous adjournment requests and the decision to re-open her case to call the CMA. In the alternative, the prosecution argued that the decision of the respondent to re-open her case arose from an exceptional circumstance, and, therefore, under *Jordan*, should not have been attributed to the prosecution.

III. Analysis

[16] *Jordan* sets a presumptive 18-month ceiling for proceedings in provincial courts, beyond which delay is presumptively unreasonable and a violation of section 11(b) of the Charter. The

prosecution accepts that the relevant time frame for completion of the trial in the instant case was likewise 18 months under the principles from *Jordan*. I note parenthetically that the presumptive 18-month ceiling from *Jordan* has been consistently applied by Courts Martial: see, for example, *R. v. Thiele*, 2016 CM 4015 at para. 21, *R. v. Tuckett*, 2019 CM 3006 at para. 12, *R. v. McGregor*, 2019 CM 4011 at para. 10.; *R. v. Stacey*, 2019 CM 3017 at para. 12, *R. v. Kohlsmith*, 2021 CM 3008 at para. 13; *R. v. Goulding*, 2022 CM 2013 at para. 18; *R. v. Remington*, 2021 CM 5023 at para. 25, and *R. v. Zapata-Valles*, 2022 CM 3011 at para. 76.

[17] *Jordan* requires a trial court to conduct an exercise under which it first calculates the total delay from the date charges were levied to the anticipated end date of the trial. From this, delays for which the defence is responsible are deducted, to arrive at a net delay figure. If the net delay exceeds the presumptive ceiling, the delay is presumptively unreasonable, and the prosecution bears the burden of establishing the presence of exceptional circumstances. If the prosecution does not discharge this burden, a stay of proceedings will be granted (*Jordan* at para. 47). As this Court noted in *R. v. Kohlsmith*, 2024 CMAAC 8 at paragraph 4, “[e]xceptional circumstances lie outside the [prosecution’s] control in the sense that (i) they are reasonably unforeseen or reasonably unavoidable, and (ii) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise”.

[18] On appeal from a decision staying proceedings under the principles from *Jordan*, deference is owed to a trial court’s findings of fact, but characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a

standard of correctness: *R. v. Pauls*, 2020 ONCA 220, [2020] O.J. No. 1186 (QL) at para. 40, aff'd *R. v. Yusuf*, 2021 SCC 2, [2021] 1 S.C.R. 5 at paras. 2–3.

[19] Applying these principles, I see no reviewable error in the Military Judge's November 25, 2024 Order.

[20] One can readily dismiss all the prosecution's arguments based on the respondent's proceedings in the Federal Court and on other matters that took place after August 3, 2023, because there is no reviewable error in the Military Judge's conclusion that they are irrelevant. It is undisputed that the respondent's trial would have been completed within the presumptive 18-month ceiling had the trial been held in November 2023, and that the ceiling was exceeded before April 2024. Thus, what happened after the adjournment was granted on August 3, 2023 is irrelevant to the review of the Military Judge's November 25, 2024 Order. Rather, this appeal turns on whether the Military Judge erred in attributing responsibility for exceeding the 18-month ceiling to the prosecution by reason of events that transpired on August 3, 2023.

[21] As noted, the prosecution argues that the Military Judge made a palpable and overriding error of fact in concluding that the respondent was available in particular in November 2023 and January 2024 but the prosecution was not. I disagree. Having carefully reviewed the transcript of the August 3, 2023 hearing before the Military Judge and the email from counsel for the prosecution sent that day, I agree that both parties were not available in January 2024. However, it was entirely open to the Military Judge to find that the respondent was available in November but the prosecution was not. There were only two days where counsel for the defence was

unavailable during the three November weeks discussed, and it was possible that the trial could have been scheduled for two weeks. Further, it is undisputed that the prosecution was not available at all in November, or, indeed, until April 2024.

[22] Thus, I see no error in the Military Judge’s conclusion that responsibility for exceeding the 18-month ceiling lay with the prosecution. As the Supreme Court of Canada noted in *R. v. Hanan*, 2023 SCC 12, [2023] 1 SCR 467 at paragraph 9:

... we reject the Crown’s proposed “bright-line” rule according to which all of the delay until the next available date following defence counsel’s rejection of a date offered by the court must be characterized as defence delay. ... [T]his approach is inconsistent with this Court’s understanding of defence delay. Defence delay comprises “delays caused solely or directly by the defence’s conduct” or “delays waived by the defence” (*Jordan*, at para. 66). Furthermore, “periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable” (para. 64).

[emphasis added]

[23] I turn next to the issue of whether the Military Judge erred in failing to attribute the delay to the defence because it had caused other, earlier delays and decided to call the CMA as a witness.

[24] The arguments premised on earlier delays are without foundation because the Military Judge in his June 21, 2022 Order had already attributed to the respondent the delays caused by earlier adjournments that flowed from earlier unsuccessful constitutional challenges and from other adjournment requests: Appeal Book pp. 830–831. The Military Judge relied on this attribution in the November 25, 2024 Order. These earlier delays are therefore irrelevant.

[25] As for the fact that it was the respondent that raised the Charter challenge that gave rise to the need to call the CMA as a witness and decided to call the CMA to testify, this is likewise irrelevant as the Military Judge was aware of these facts and would have attributed all of the 217-day delay to the respondent but for the unavailability of counsel for the prosecution for trial dates before the 18-month ceiling was exceeded. And, as already discussed, it was open to the Military Judge to find that it was such unavailability that led to the trial being scheduled after the end of the 18-month ceiling.

[26] I turn finally to the argument that exceeding the 18-month ceiling was due to extraordinary circumstances. This issue was not canvassed by the Military Judge because it was not raised by the prosecution before him. An appellate court possesses discretion to allow a new issue to be raised on appeal, but such discretion should not be “exercised routinely or lightly”: *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at para. 22. As this argument could readily have been raised by the prosecution before the Military Judge, I am far from certain that this Court should allow the prosecution to raise it on appeal.

[27] In any event, I do not see that the request of the respondent to reopen her case flowed from an unforeseen circumstance. Even if the documents in question that the prosecution intended to tender, and then said it was willing to proceed without, could have been tendered without producing a witness, the respondent was entitled to require the CMA to have been produced as a witness to question him about the documents. Moreover, the documents in question and the testimony of the CMA about the process for selecting a panel were relevant to the respondent’s constitutional challenge. Thus, it was reasonably foreseeable that the respondent

would seek to reopen her case when the prosecution declined to call the CMA as a witness and sought to reverse its decision to tender the documents in question.

[28] I thus conclude that there is no basis to interfere with the November 25, 2024 Order of the Military Judge, staying proceedings.

IV. Proposed Disposition

[29] I would accordingly dismiss the appeal. This conclusion renders the cross-appeal moot. A Court possesses discretion to decide a claim that has become moot: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 344. That said, I would decline to exercise such discretion in this case because the issues raised in the cross-appeal would be better addressed in a case where they might have a bearing on the outcome in the unlikely event they were ever to again arise. I would therefore dismiss the cross-appeal for mootness.

“Mary J.L. Gleason”
Chief Justice

“I agree.

Yves de Montigny J.A.”

“I agree.

Louise A. Charbonneau D.J.A.”

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: CMAC-648

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MAJOR (RETIRED) V.M.S.
JACQUES

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CONCURRED IN BY: DE MONTIGNY J.A.
CHARBONNEAU D.J.A.

DATED: MARCH 25, 2026

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