Date: 20080207

Docket: CMAC-496

Citation: 2008 CMAC 2

CORAM: **BLANCHARD C.J.**
GOODWIN J.A.
PHELAN J.A.

BETWEEN:

EX-PRIVATE ALAIN FRANCIS LeGRESLEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 19, 2007

Judgment delivered at Ottawa, Ontario, on February 7, 2008

REASONS FOR JUDGMENT BY: **BLANCHARD C.J.**

CONCURRED IN BY: **GOODWIN J.A.**
PHELAN J.A.

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REASONS FOR JUDGMENT

THE CHIEF JUSTICE

A. Introduction

[1] The Appellant, Ex-Private LeGresley, was charged and convicted before a Standing Court Martial of two charges of trafficking cocaine under s. 130 of the *National Defence Act*, (R.S., 1985, c. N-5), contrary to s. 5(1) of the *Controlled Drugs and Substances Act*, (1996, c. 19). The charges were laid on September 21, 2005, and it took nearly 15 months to bring the matter to trial. The military judge dismissed a preliminary motion seeking to have the charges stayed by reason of unreasonable delay in bringing the matter to trial. The Appellant argued that his rights protected under the *Canadian Charter of Rights and Freedoms, Schedule B, Part 1 to the Canada Act 1982 (U.K.)* 1982, c. 11 (the *Charter*) had been violated.

[2] The Appellant was tried before a judge alone, at Canadian Forces Base (CFB) Borden. The trial began on December 12, 2006 and ended on December 15, 2006. The military judge sentenced the Appellant to 60 days of imprisonment. He was granted release pending his appeal, but, nevertheless surrendered to military authorities on January 10, 2007, and served his entire sentence. The Appellant appeals his convictions before this Court.

[3] The Appellant also appeals the military judge's decision to dismiss the preliminary motion to stay the proceedings on the grounds that the Appellant's rights protected under sections 7 and 11(b) of the *Charter* had been violated. I will first turn to the appeal relating to the decision dismissing the Appellant's motion for a stay based on *Charter* grounds.

B. Did the military judge err in dismissing the Appellant's motion to stay the proceeding?

Facts relating to the motion for a stay

[4] An "Agreed Statement of Facts" setting out the procedural timeline for this case was produced by the parties on the stay application. I set out below a summary of the details therein:

> As it appears on the charge sheet dated 8 February 2006 before this court, the alleged offences would have occurred on 8 and 12 April 2005. According to the prosecution's position, the accused ex-Private Legresley would have sold a quantity of cocaine to an investigator on the National Investigation Service (NIS) operating under cover. This was part of a larger operation, which had commenced on 30 March 2005, during which other Canadian Forces (CF) members stationed at CFB had been targeted for investigation.

On 19 April 2005, ex-Private Legresley and approximately nine other CF members were arrested and subsequently interviewed in relation to their drug involvement. These arrests terminated the undercover operation which had commenced on 30 March 2005.

In the course of his interview, ex-Private Legresley admitted having picked up some cocaine for the undercover agent.

The substances obtained from ex-Private Legresley were sent for analysis and two certificates of analysis confirming the substances were cocaine issued on 21 April 2005 and received by the NIS investigators shortly thereafter.

On 21 September 2005, Sergeant Turner, the NIS investigator laid the same two charges that are found on the charge sheet before this court.

On 6 October 2005, ex-Private Legresley was informed of the options available to him regarding his representation at his potential court martial.

On 20 October 2005, ex-Private Legresley requested the appointment of a military counsel, Major Appolloni if available, to represent him in relation to those charges.

On 25 October 2005, Colonel S.E. Moore referred the matter to the Assistant Deputy Minister/Human Resources/Military recommending that a court martial be convened for the trial of ex-Private Legresley.

On 3 November 2005, the Assistant Deputy Minister/Human Resources/Military further referred the matter to the Director of Military Prosecution with the recommendation that a court martial be convened.

On 17 November 2005, Captain Simms, Regional military Prosecutor, Western Region, was appointed to review the matter and determine what, if any, charges were to be preferred.

On 17 January 2006, Major Appoloni from the office of the Director of Defence Counsel Services was appointed to represent ex-Private Legresley.

On 8 February 2006, Captain Simms signed the charge sheet now before this court.

On 14 February 2006, the Deputy Director of Military Prosecutions sent a letter to the Court Martial Administrator (CMA) to schedule a date for the trial of ex-Private Legresley.

On 16 February 2006, the Acting Court Martial Administrator (A/CMA) sent a letter to the appointed prosecutor and defence counsel to inform that he was not in a position to propose a date at that particular time. (The letter is to be adduced as part of this statement of agreed facts.)

On 24 April 2006, Captain Bussey (Captain Simms' married name) forwarded the initial disclosure to the office of the Director of Defence Counsel Services.

On 12 June 2006, Captain Bussey forwarded additional disclosure to the office of the Director of Defence Counsel Services as well as a "will say" statement containing the name of three witnesses.

Toward the end of June 2006, Major Appolloni returned the file material to the Director of Defence Counsel Services for re-assignment as he was posted out of the Directorate.

On 12 September 2006, Lieutenant Colonel Couture, current counsel of ex-Private Legresley, was appointed as new defence counsel.

On 18 September 2006, Major Caron, the current prosecutor, was informed that he would take charge of the prosecution of this matter.

Toward the end of September 2006, Major Caron informs Lieutenant Colonel Couture that he is the new prosecutor on the file but that he still does not have the case material.

On 3 October 2006, the CMA sends an e-mail to both counsel inquiring about their availability for trial.

In mid-October 2006, Major Caron received file material from Captain Bussey.

At the end of October to 10 November 2006, counsel progressively investigate possibilities of settlement.

> On 20 November 2006, counsel received a hastener from the office of the CMA regarding the proposed trial date of 21 November 2006. The same day, the prosecutor informed the CMA's office that some witnesses would not be available on the proposed date, stating, however, that should there be a guilty plea, he would be available to proceed on that date.
>
> On 14 November 2006, the deputy CMA informed that the 21 November date was no longer an option. Within a few days, counsel agreed on the date of 12 December 2006.
>
> The prosecution informed ex-Private Legresley's counsel that the charges of theft referred to in Lieutenant Colonel Weatherill's letter dated 27 March 2006 at paragraph 2(h) will not be proceeded with and are about to the withdrawn.

[5] In addition the following facts were not in dispute in the stay application: that the Appellant was not tasked with meaningful work from the time shortly after his arrest on the charges (April 19, 2005) until he formally complained in writing of the situation in January 2006, and was given useful work to do some weeks later; and that during this 8-month period, the Appellant was required to report daily and sit on a chair outside the company office throughout the workday (the chair treatment).

[6] The following facts were also before the military judge: the Appellant had been injured in a training session in June 2002 precluding him from participating in physical training resulting in him being placed on permanent medical employment limitations; he had failed his training as a weapons technician; he had problems with substance abuse which led to other disciplinary issues including theft. As a result, the Appellant had been expecting to be released from the Canadian Forces around February 2006 and had in fact signed the "Notice of Intent to Recommend Release" indicating that he did not object to the proposed release.

The military judge's finding relating to the motion for a stay of proceedings

[7] The judge began by instructing himself on the principles underlying s. 11(*b*) of the *Charter* and the interests it is intended to protect. He set out the four factors articulated by the Supreme Court in *R. v. Morin* [1992] 1 S.C.R. 771 at 787-788 (the Morin factors) that a judge must consider in determining the reasonableness of the time taken to move a case to trial. He then set out the factors the Court must examine in considering the reasons for the delay and acknowledged that these factors are not to be applied in a mechanical way and that the Court's primary concern is the effect of delay on the interests protected by s. 11(*b*) of the *Charter*.

[8] The military judge calculated the delay from the laying of the charges (September 21, 2005) until the trial (mid-December 2006) at almost 15 months. The prosecution conceded and the Court accepted that this time period was sufficiently long to require further scrutiny. The issue of waiver was not raised by the prosecution, and the defence never conceded it.

[9] The judge found the reasons for the delay to have been: a change of the assigned prosecutor in September 2006; a change of defence counsel at about the same time; and the unavailability of judicial resources at the time of the preferring of the charges to court martial in February 2006 until early-October 2006. He did not attach significance to this latter reason because the parties themselves were not ready for trial until October 2006. He found that the trial date was set reasonably promptly thereafter for December 2006.

[10] The judge noted that the evidence adduced and arguments advanced at the hearing related essentially to the issue of prejudice. He concluded that there was no prejudice in this case other than the ordinary stress and anxiety that is part of all criminal proceedings. He found there was no evidence that the Appellant had suffered unduly. Although he accepted the evidence about the lack of tasking and the chair treatment, he was not satisfied that these were punishments relating to the charges and thus could not have resulted in any prejudice for the purposes of the s. 11(*b*) analysis. Furthermore, the Appellant's release from the Canadian Forces in March 2006 was irrelevant to the question of prejudice because it was not solely based on the drug trafficking allegations, as there were many other factors that supported the release.

Position of the Appellant on the appeal of the decision to dismiss the motion for a stay or proceedings

[11] The Appellant submits that the judge erred in not proceeding to a proper analysis of the relevant factors in *Morin* set out above. He asserts that the lack of a detailed analysis makes it difficult to determine how the judge reached the conclusion that the delay was not unreasonable, a conclusion which was not supported by the evidence. He also alleges that the judge misapprehended the burden of proof arguing that the evidentiary burden to explain the delay had shifted to the Crown and that the Crown had failed to meet this burden. The Appellant cites the majority opinion of Mr. Justice Sopinka in *R. v. Smith*, [1989] 2 S.C.R. 1120, at 1132-1133, in support of his contention.

[12] It is the Appellant's position that the delay was attributable to the Crown and it had the burden of explaining it, which it failed to do. In the Appellant's submissions, the 15-month delay

to trial was caused by the Crown's tardiness in laying charges and providing the initial disclosure, the 2-month delay in appointing a prosecutor, the 3-month delay between the appointment of the prosecutor and the preferring of the charges and, to some extent, the unavailability of judges for a hearing. The judge's failure to consider these factors in his analysis resulted in error.

[13] The Appellant submits that the delay is also unreasonable because it violates one of the foundational values and legal requirements of the military justice system – a speedy trial. The Appellant asserts that the uniqueness of the military justice system is an extremely important factor that the judge failed to assess, citing Chief Justice Lamer in *R. v. Généreux*, [1992] 1 S.C.R. 259 at p. 193, "…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."

[14] On the issue of prejudice, the Appellant asserts that there is a clear relationship between his arrest in relation to these charges and the chair treatment. This treatment showed a blatant disregard for the presumption of innocence on the part of the military authorities, and prejudiced the Appellant's liberty and security interests because, *inter alia*, he had to sit in the chair all day and even had to ask permission to go to the washroom.

[15] The Appellant impugns the judge's finding that his release from the Canadian Forces was irrelevant to the issue of prejudice. The Appellant points out that he was released because of "unsatisfactory conduct," defined under Article 15.01, item 2(*a*), of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os) as a release of an officer or non-commissioned member,

- where convicted by a service tribunal of an offence which warrants release under this category, but does not warrant release under Item 1(*b*) [Service Misconduct];
- where convicted by service tribunals of a number of offences indicating a course of misbehavior which warrants release under this category, but does not warrant release under Item 1(*b*);
- by reason of unsatisfactory civil conduct, or conviction of an offence by a civil court, of a serious nature not related to the performance of his duties but reflecting discredit on the Service.

[16] The Appellant asserts that his release under this provision was a serious error clearly brought on by his arrest in relation to the events in question and resulted in great prejudice because he had not been convicted of any offence at the time.

[17] Finally, the Appellant argues that the judge failed to consider the termination of his civilian employment in December 2006 because he had to return to CFB Borden for his trial, not knowing when he would return home. This prejudice caused by the unexplained unreasonable delay should have resulted in the application for a stay of proceedings being granted.

Position of the Respondent on the appeal of the decision to dismiss the motion for a stay or proceedings

[18] The Respondent submits that the correct approach to be followed in determining whether the Appellant's right to be tried within a reasonable time has been violated is as set out in *R. v. Reid*, [1999] N.J. No. 47; 171 Nfld & P.E.I.R. 143 (NLCA). At para. 14 of *Reid*, the Newfoundland Court of Appeal adopted a stepped approach to a consideration of the Morin factors requiring that certain thresholds be met before the inquiry can move to the next factor.

[19] The Respondent's position is that the trial judge engaged in a detailed consideration of the factors set out in *Morin*, above, in the context of the evidence and submissions placed before him and that his reasons, taken as a whole, indicate that he was alive to the issues in this case and dealt with them appropriately.

[20] On the issue of the burden of proof on the motion for a stay, the Respondent denies that the judge misdirected himself on or misapplied the law and that the evidentiary burden shifted to the prosecution in this case. The prosecution did not need to prove that the direct acts of the Appellant caused the delay or that his actions constituted a waiver of his rights because it did not allege these factors. The judge did not attach significance to the unavailability of judicial resources and, therefore, the prosecution did not have to justify the institutional delay. Finally, the Respondent contends that the prosecution did not have to establish that the delay caused no prejudice to the Appellant because the Appellant himself had not persuaded the Court that prejudice existed in the circumstances of the case, or if it did, that it fell within the scope of the protection of s. 11(*b*) of the *Charter*.

[21] On the reasons for delay, the Respondent submits that the existence and significance of the inherent time requirements to bring a charge before a court martial can be inferred, to some extent, from the fact that so many actors (including the Appellant's then-Commanding Officer, the referral authority, the Director of Military Prosecutions, and the military prosecutor assigned to review and, if necessary, prosecute the charges arising from the alleged offence) are required by the QR&Os to be involved in the disciplinary process.

[22] With respect to the Appellant's actions contributing to the delay, the Respondent points out that the Appellant specifically requested that Major Appoloni be appointed as his counsel. Major Appoloni, who was appointed, had to eventually pass on the case by reason of being posted out of the Defence Counsel Services (DCS). As a result, the newly assigned counsel conceded that the defence was not in a position to proceed to trial prior to September 2006.

[23] Regarding the actions of the prosecution, the Respondent submits that there is no evidence of any inordinately slow action by the prosecution in laying or preferring the charges, or bringing the matter to court. The delay between the laying and preferring of the charges was consistent with the time requirements inherent in the military justice system. Furthermore, the prosecution did not delay in providing disclosure as there was never a request made by the Appellant; in fact, the prosecution made the initial disclosure in the absence of such a request. Thus, this delay should not be counted against the prosecution.

[24] Finally, with respect to institutional resources, the Respondent submits that institutional delay starts to run when the parties are ready for trial and therefore the trial judge was correct in not attaching significance to the unavailability of judicial resources because the parties were not ready to proceed to trial until October 2006 and the trial was set for December 2006.

[25] Consequently, the Respondent submits that the delay in this case was not unreasonable and the military judge's dismissal of the application for a stay of proceedings should be upheld. It is argued that the Court would only need to examine the issue of prejudice and the balancing of the interests of the Appellant and of society if it found that, despite the above explanations, the delay was unreasonable.

[26] The Respondent contends that even if the Court were not satisfied with the explanations, for the delay, the trial judge was correct in finding that there was no prejudice to the Appellant. The Respondent submits that the issues relating to the Appellant's loss of civilian employment and the chair treatment had nothing to do with the post-charge delay.

Analysis

[27] At paragraph 19, of his memorandum of fact and law the Appellant states: "**With respect to the legality of the decision of dismissing the application under sections 11(*b*) and 7 of the Charter,** the Appellant respectfully submits that the learned military judge erred in fact and in law in concluding that the Appellant's right to a trial within a reasonable time under section 11(*b*) had not been violated. […]" [emphasis in the Appellant's memorandum]. However,

the Appellant did not pursue, either in his written or oral submissions, any argument in relation to section 7 of the *Charter*.

[28] This analysis will therefore only focus on s. 11(b) of the *Charter*. I will in turn deal with the issue of the evidentiary burden raised by the Appellant, the sufficiency of the military judge's analysis in respect to the two first Morin factors and the Respondent's submissions with respect to the analytical approach proposed in the above cited *Reid* case. I will then move to consider the overall delay having regard to the Morin factors.

The burden of proof

[29] Regarding the issue of the burden of proof, the Appellant's submission that the military judge misapprehended or misapplied the law is without merit. The passage from *Morin* quoted by the Appellant, as set out in full below, clearly indicates that the ultimate burden of proving a breach of s. 11(*b*) of the *Charter* lies with the Appellant. Mr. Justice Sopinka writing for the majority at page 788 of his reasons, stated:

> The role of the burden of proof in this balancing process was set out in the unanimous judgment of this Court in [*R. v. Smith,* [1989] 2 S.C.R. 1120 at 1132-33], as follows:
>
> > I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an

> adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the overall lapse of time having regard to the factors referred to above.
>
> I do not read [*R. v. Askov*] as having departed from this statement although portions of the reasons of Cory J. emphasized certain aspects of the evidentiary burden on the Crown. [My emphasis.]

[30] As will become evident below, while the circumstances in the instant case warrant a shifting of the evidentiary burden in considering the 5-month delay between the laying and preferring of charges, in the end, the burden of proof will not be a determining factor.

The sufficiency of the military judge's analysis

[31] With respect to the argument that the judge erred by not conducting a detailed analysis in respect to the first two Morin factors, I find that the analysis was sufficient in the circumstances, considering the concessions made by both parties and their submissions.

[32] The first question to be addressed in the *Morin* analysis is whether the delay is exceptional. It is settled law that the relevant time period for the purposes of a s. 11(*b*) *Charter* analysis is from the date of the charge to the trial date. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the Appellant is able

to raise the issue of reasonableness of the period by reference to other factors such as prejudice (*Morin*, above, at page 789). In this case, the Crown conceded that the 15-month delay was significant and warranted explanation. Further, the Respondent does not assert and the Appellant does not concede waiver.

The Respondent's position regarding the Newfoundland Court of Appeal approach in the Reid case

[33] I now turn to the analytical approach advocated by the Respondent, namely, the approach adopted by the Newfoundland Court of Appeal in *Reid*, above, on the conduct of a s. 11(*b*) analysis. In my respectful view, this approach is not consistent with the analysis required by the Supreme Court. Justice Cory stated in *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1223, that the length of the delay "is not a threshold requirement … but rather is a factor to be balanced along with the others." Justice Arbour, writing for the majority in *R. v. Bennett*, [1991] O.J. No. 884, 3 O.R. (3d) 193 at para. 52 (C.A.), aff'd. [1992] 2 S.C.R. 168, warned against paying "mere lip service … to the required balancing of the four factors." Likewise, the issue of prejudice is crucial to the determination of whether delay is unreasonable, and thus should not only be considered when the explanations are unsatisfactory, as if it were an "additional" factor, contrary to the Respondent's submission and the *Reid* approach. The approach to be followed on a s. 11(*b*) *Charter* analysis is the approach set out in *Morin*, above, and requires the weighing and balancing of each of the four factors in order to determine the reasonableness of the delay.

[34] The approach described by the Supreme Court in *Morin* to determine whether a s. 11(*b*) *Charter* right has been denied requires a balancing of the interests that the section is designed to

protect against factors that either inevitably lead to delay or are otherwise the cause of delay. The Supreme Court stated that the factors to be considered in the analysis may be listed as follows:

1. the length of the delay;

2. waiver of time periods;

3. the reasons for the delay, including:

    (a) inherent time requirements of the case,

    (b) actions of the accused,

    (c) actions of the Crown,

    (d) limits on institutional resources, and

    (e) other reasons for delay; and

4. prejudice to the accused.

[35] At page 788 of its reasons, the Court went on to describe the judicial process as follows:

> The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(*b)* is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See *R. v. Kananj* [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(*b*) seeks to protect, the explanation for the delay and the prejudice to the accused.

[36] It is useful at this point to briefly review the interests that s. 11 of the *Charter* is designed to protect. The primary purpose of s. 11(*b*) is the protection of the individual rights of accused persons: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh. A secondary interest of society as a whole has also been recognized by the Supreme Court (*Morin*, above), namely that those who are accused of crimes are brought to trial and dealt with according to the law and are treated humanely and fairly.

The overall delay – the Morin factors applied

[37] I will now proceed with a consideration of the *Morin* factors. I have dealt with the first two factors, length of the delay and waiver. As indicated above, waiver is not an issue and the Respondent agrees that the 15-month delay was significant and warrants an explanation. I now turn to the reasons for delay and prejudice, the remaining factors in the prescribed analysis. The factors leading to the overall delay in this case cannot be easily compartmentalized. As a consequence, certain elements will overlap in my analysis of the different factors. As indicated below, this is due mainly to the nature of the military's administrative structure.

[38] In assessing the reasons for the delay, I will consider in turn, the inherent time requirements for the case; the actions of the accused; the actions of the prosecution; and limits on institutional resources.

(a) Inherent time requirements

[39] All offences have certain inherent time requirements which inevitably lead to delay. There are inherent time requirements that flow from the particular nature or complexity of the case itself. A more complex case will take longer to prepare and argue than a simple case. See *Morin*, above, at page 792. In addition, regardless of the particular charges involved, there are inevitable delays in the "initiative procedures", such as retention of counsel, bail hearings, police and administrative paperwork, disclosure, etc. that are required before the matter is brought to trial. Delays incurred due to these time requirements generally do not count against either side.

[40] The length of time necessary for these "initiative procedures" will be influenced by local practices and "conditions in the regions". Further, the military administrative structure imposes additional duties requiring the involvement of various actors in the military chain of command before a charge can be preferred. These additional requirements are found in the QR&Os.

[41] Chapter 107 of the QR&Os sets out the requirements in the military justice system relating to the preparation, laying and referral of charges. Article 107.03 requires that before charges are laid advice must be obtained from a legal officer. After the laying of charges, article 107.09(1) requires that the charge be referred to the commanding officer, delegated officer or superior commander of the accused who decides if the charges are to proceed. Before doing so, the commanding or delegated officer must obtain advice from the unit's legal advisor pursuant to article 107.11. Should the advice of the unit's legal officer not be followed, a written decision must be filed with reasons. Pertinent articles of Chapter 107 QR&Os are attached in the annex to these reasons.

[42] It is the Respondent's position that the 5-month delay between laying and preferring the charges is consistent with the time requirements inherent in the military justice system.

[43] The Respondent contends that the military judge was alive to the issue of the inherent time requirements of this case. The military judge did note the requirement for a change in both prosecution and defence counsel and did question counsel in their preparation and when they would have been ready to proceed to trial. He did not, however, expressly deal with the question of inherent time requirements particular to the military justice system and made no specific findings in this respect with regard to the charges at issue. In my view, it would have been difficult for him to do so since he had no evidence before him in respect of the inherent time requirements for the particular charges at issue.

[44] It is likely that a military judge, as an officer in the Canadian Forces, is familiar with and generally aware of the time requirements of the military administrative structure. However, such general awareness may be of little assistance, when a determination is required in respect to the inherent time requirements for a given offence in a particular case. Given the absence of any evidence of inherent time requirements in the military justice system for the charges at issue, it is difficult to ascribe much weight to the assertion of the Respondent that the 5-month delay between the laying of the charge and its being preferred is consistent with the time requirement in the military justice system.

[45] The burden here is on the prosecution to justify the 5-month delay between laying and preferring of the charges and to explain why it is necessarily inherent to the military justice

system. The Crown is in a far better position than the Appellant to adduce such evidence, since it is evidence that is particular to the military administrative structure and its requirements. Such evidence may consists of the timelines required to obtain the required legal advice, the availability of legal officers, evidence pertaining to the complexity of the case relative to other cases, and exceptional circumstances in the case. These examples are clearly not exhaustive, but are an indication of the sort of evidence that may be adduced to assist the court in deciding whether in a particular case, the delay can be said to be justified by reason of inherent administrative requirements in the military justice system.

[46] Further, while administrative requirements inherent to the military context may serve to excuse a longer delay than would otherwise be the case in non-military context, the rationale for these administrative requirements must also be established in the evidence so that they may be accepted as necessarily inherent to the process. In the context of a s. 11(*b*) *Charter* case, it is insufficient to simply point to the additional steps required in the QR&Os as a complete explanation for the additional delay. If the delay required by these additional steps is to be accepted as inherently necessary to the military justice process, the rationale explaining the need for the additional steps must be set out. The enactment of a complex regulatory scheme, such as the QR&Os imposing the requirement of additional procedural and administrative steps in a criminal proceeding, which results in additional delay, cannot, without further explanation, serve to justify an extended inherent time requirement. For instance, it may be useful to explain why multiple legal opinions are required in a relatively simple case before a charge can be preferred. In the instant case, the Crown offered no explanation as to why a second legal opinion was

required. As noted above, a first legal opinion was obtained from a legal officer before the laying of the charges.

[47] However, as will become evident from my reasons below, the actions of the Appellant in requesting the appointment of Major Appoloni as his counsel and the delay which resulted therefrom serve to neutralize the 5-month delay between the laying and the preferring of the charges. Otherwise, it would have been incumbent on the Crown to explain this delay.

(b) Actions of the Appellant

[48] This aspect of reasons for delay includes all actions voluntarily taken by the accused which may have caused delay. In considering this factor, there is no necessity to impute improper motives to the Appellant. The following kinds of actions could be included in this category:

- application for a change of venue (*R. v. Conway*, [1989] 1 S.C.R. 1659 at 1678-1679)
- motion to quash a committal (*ibid*)
- challenge to the validity of a search warrant (*Morin,* above, at 793)
- exercise of the right to counsel of choice (*Conway,* above, at 1679-1680)
- changes of counsel (*R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 347 (Ont. C.A.), aff'd. [1997] 3 S.C.R. 700)
- re-election (*Bennett,* above, at para. 96.)
- adjournment request (*Morin,* above, at 793)

- incurring further charges while on release (*Allen*, above, at 348)
- change in trial tactics (*ibid* at 349)

[49] Many of the above examples of actions by an accused are unquestionably *bona fides* and do not necessarily constitute a waiver. If, however, the accused chooses to take such actions this will be taken into account in determining what length of delay is reasonable. (*Morin*, above, at 793.)

[50] A significant factor in this case is the delay caused by the appointment of counsel for the Appellant. The agreed statement of facts establishes that the Appellant on October 20, 2005, requested a particular officer, Major Appoloni, to be appointed as his counsel. Major Appoloni was not appointed until January 17, 2006. In June 2006, he was posted out of the DCS for reasons unrelated to this case and had to return the Appellant's file for re-assignment. New counsel for the Appellant was appointed only on September 12, 2006.

[51] While blame cannot be ascribed to the Appellant for exercising his right to choice of counsel nor for the fact that his original choice became unavailable, the delay resulting from this situation is nevertheless a consequence of the Appellant's voluntary action of having requested a particular counsel and will be counted against him in determining what length of delay is reasonable. This issue was canvassed by the Supreme Court of Canada in *Conway*, above. In that case the accused was being tried for the third time on a murder charge. The accused requested an adjournment because he wanted to change counsel and retain a particular lawyer. He also applied

for a change of venue to facilitate his choice of counsel. Justice L'Heureux-Dubé, writing for the majority in *Conway*, above, at paras. 34-35, stated:

> While an accused, in his dealings with the judicial process, benefits from the right to counsel under s. 10(b) of the Charter, this Court remarked in *R. v. Ross*, [1989] 1 S.C.R. 3, that the right to retain counsel has to be exercised with reasonable diligence in light of the circumstances. Delivering the reasons of the majority of the Court, with all members of the Court concurring on this particular point, Lamer J. wrote (at p. 11): "[A]ccused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.
>
> The issue under s. 11(b) in the present instance is not whether the appellant had the right to be represented by a counsel of his choice: he had that right (Ross, supra). Rather, the issue is whether, having incurred considerable delays in so doing, the appellant can successfully invoke such delays in his claim that his right to be tried within a reasonable time has been infringed. In my view, he cannot." [Emphasis added.]

[52] It is argued that the delay in appointing defence counsel is due, at least in part, to the inherent administrative requirements of the DCS. However, there is no evidence on the record regarding the administrative process of DCS. We do know that, in this instance, Major Appoloni was transferred out of the DCS and that this required the assignment of another defence counsel to the case. The circumstances surrounding the appointment of Major Appoloni's replacement are unknown to the Court.

[53] It is useful to recall that the legal burden to establish a *Charter* breach lies with the Appellant. Where a party raises sufficient concerns regarding the delay, absent an explanation from the Crown, the Court may conclude that unreasonable delay exists.

[54] The Appellant raised such concerns in respect of the 5-month delay between the laying and the proferring of charges. However, in respect of the 3-month delay to reassign new defence counsel, the Appellant has failed to adduce any evidence or provide a reason to shift the evidentiary burden to the Minister to explain the delay.

[55] Even if the Appellant had established, and he did not, that the 3-month delay in re-assigning his file to a new defence counsel is attributable to the inherent administrative structure of DCS, this would still not help his argument. The jurisprudence also teaches that the conduct of defence counsel in seeking disclosure is a proper consideration in considering the reasonableness of the delay. This principle was applied in *R. v. Macpherson*, 1999 BCCA 403, a case which involved a s. 11(*b*) *Charter* argument. The British Columbia Court of Appeal unanimously overturned a decision to grant a stay of proceedings in a case about possession of narcotics and ruled that the trial judge erred by ascribing 10 months of delay (out of a total 12 ½-month period) to the Crown's failure to disclose a police officer's notes to the defence. At para. 18 of his reasons, Justice Finch stated: “It is clear from the trial judge's review of the case history that Mr. Westlake [the defence counsel] was not diligent in seeking the disclosure of information he knew ought to be made available by the Crown. But the judge does not seem to have given any real weight to the conduct of the defence in deciding whether the overall delay was unreasonable. In my respectful view, in this she erred.”

[56] The evidence indicates that the Appellant was not diligent in the conduct of his defence. He only contacted Major Appolloni twice between January and June of 2006. Initial disclosure

was forwarded in April 2006 by the prosecution and was not sought by the defence. Even with his own counsel armed with disclosure, it is unclear whether the Appellant was ready to proceed to trial in June 2006, prior to Major Appolloni's departure. While it is accepted law that the primary burden to bring a case to trial rests with the prosecution, in the context of a s. 11(*b*) *Charter* argument, the Appellant cannot remain passive. If he elects to do nothing, or does very little and lies in wait, then such conduct will be appropriately considered and weighted in the overall balancing. Here, the Appellant's conduct, and specifically his lack of diligence between January and June 2006, supports the military judge's finding that the Appellant was not prepared to proceed to trial until October 2006.

(c) Actions of the Crown

[57] As with the conduct of the accused, this factor does not serve to assign blame. It is rather a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. See *Morin*, above, at 794. These delays will usually be counted against the Crown. On this factor the Appellant essentially argues that the overall 15-month delay is due to inaction of the Crown and the slowness with which the prosecution moved the case forward. The Appellant also points to the inherent time requirements within the military justice system which further exasperate the situation. These inherent requirements have been discussed in some detail above.

[58] The Appellant raises the issue of the pre-charge delay; that is the 4-month period between his arrest and the laying of the charges. It is argued that this delay should also be considered in

the overall delay period. However, as stated by the military judge in his reasons, the jurisprudence is clear that, for the purposes of determining the reasonableness of the delay, time is counted only after the charges have been laid.

[59] The Appellant also claims that there was a delay in receiving disclosure. Here, however, it is the prosecution on April 24, 2006, that made the initial disclosure. The Appellant did not request disclosure. The obligation to disclose is triggered by a request by or on behalf of the accused. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 342-343. In these circumstances, where the obligation to disclose is not triggered, it would be improper to count the delay relating to disclosure against the prosecution.

(d) Limits on institutional resources

[60] In an ideal world there would be no delays in bringing an accused to trial. Since we do not live in Utopia, the courts have recognized that some allowance must be made for limited institutional resources. See *Askov*, above, at 1225. The time period for institutional delay starts to run when the parties are ready for trial but the system cannot accommodate them. See *Morin*, above, at 794-795.

[61] The issue was first brought to the attention of the parties by a letter from the Acting Court Martial Administrator dated February 16, 2006, wherein he indicated that due to the "restriction in judicial availability", he was unable to provide a trial date at that time and encouraged counsel to continue to provide any information regarding their availability. This letter was in response to an earlier letter, dated February 14, 2006, from the Deputy Director of Military Prosecutions

requesting that a Standing Court Martial be convened for the trial of the Appellant. From the Appellant's perspective, the availability of judicial resources lies at the heart of this appeal. It is the Appellant's position that, after receipt of the February 16, 2006 letter from the Acting Court Martial Administrator, both parties adopted the view that diligence in taking the required steps to move the case forward would be futile in any event since no judge was available to hear the case at that time. As a result, timely measures were not taken by either the Crown or the Appellant.

[62] It is noteworthy that the Appellant, who seeks to have the delay caused by lack of judicial resources counted in his favour, did not provide information regarding his availability as requested by the Acting Court Martial Administrator in his February 16, 2006 letter. The prosecution on the other hand is on the record requesting that a Standing Court Martial be convened for the trial of the Appellant.

[63] The weight to be given to resource limitations must be assessed in light of the fact that government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay. The Courts have adopted, in any given case, a suggested period of time beyond which the delay would be unreasonable. This period is referred to as an administrative guideline which is not a limitation period and is to be determined in light of the particular facts of each case. Mr. Justice Sopinka at 796-797 of *Morin*, above, stated that the following considerations enter into the adoption of such a guideline:

> A number of considerations enter into the adoption of a guideline and its application by trial courts. A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other factors. This premise enters into its formulation. The Court must acknowledge that a guideline is not the result of any precise

> legal or scientific formula. It is the result of the exercise of a judicial discretion based on experience and taking into account the evidence of the limitations on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion. With respect to the use of statistics, care must be taken that a comparison of jurisdictions is indeed a comparative analysis. For example, in *Askov* we were given statistics with respect to Montreal in an affidavit by Professor Baar. Subsequently, it was brought to our attention that this was a misleading comparison. Evidence was led in this appeal showing that the manner in which criminal charges are dealt with in Montreal and Brampton is sufficiently dissimilar so as to make statistics drawn from the two jurisdictions of limited comparative value. Comparison with other jurisdictions is therefore to be applied with caution and only as a rough guide. These then are the factors which enter into the formulation by an appellate court of a guideline with respect to administrative delay. I now turn to its application in the trial courts.

[64] In the instant case there is no evidence regarding the limitation of resources, the strain imposed on them, statistics from comparable jurisdictions or expert opinions. This is the sort of evidence that a court would consider in adopting an appropriate administrative guideline in any given case. Given the lack of evidence here, it would be difficult, if not impossible, to set and adopt such a guideline.

[65] In any event, it would serve no useful purpose, in this case, to determine and adopt an administrative guideline. I say this because I have not been persuaded that the evidence supports the Appellant's contention that there exists a compelling causal link between the lack of judicial resources and the delay in setting down the matter for trial. The delay is also caused by other factors, many of which are attributable to the actions of the Appellant. The weight of the evidence establishes that the Appellant took no positive action to move the file along, failed to

keep the Acting Court Martial Administrator informed of his availability, did not seek disclosure and made no express request to have the matter set down for trial. Further, the actions of the Appellant regarding his choice of counsel and his subsequent replacement have led to a concession that neither party was in a position to proceed to trial until September 2006. On the whole of the evidence, the military judge did not err in determining that the parties were not ready to proceed to trial until October 2006. It was also reasonably open to the military judge, on the evidence, to find that the time period for delay by reason of lack of institutional resources started to run in October 2006 when the parties were ready for trial. Since the trial was held in December 2006, no serious issue is raised here with respect to the limits on judicial resources.

(e) Prejudice to the Accused

[66] Prejudice to the accused may be inferred from prolonged delay. The longer the delay, the more likely that such an inference may be drawn. In circumstances where prejudice is not inferred or not otherwise proved, the basis for the enforcement of the individual right is seriously undermined. See *Morin*, above, at 801. The Supreme Court has also recognized that the s. 11(*b*) *Charter* right is one that can often be transformed from a protective shield to an offensive weapon in the hands of the accused. This may occur in instances where the interest of an accused lies in having the right infringed by the prosecution so that he can escape a trial on the merits. The right must therefore be interpreted in a manner which recognizes the abuse which may be invoked by some accused. It is recognized that inaction by an accused is a relevant consideration in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay. The Supreme Court has cautioned, however, that in taking into account inaction by the accused, the

Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right.

[67] Two questions therefore arise when prejudice by reasons of undue delay is alleged. First, can prejudice to the accused be inferred from the facts of the case? Second, if no prejudice is inferred, has prejudice to the accused been proven?

[68] With regards to the inferred prejudice, while the Appellant was not required to do anything to expedite his trial, his inaction can be taken into account in assessing prejudice. Here, the Appellant did not respond to the invitation of the Acting Court Martial Administrator to keep him informed of his availability. No request was made by the Appellant to expedite his trial and it is not helpful to speculate on whether an earlier trial date would have been possible had such a request been made. It is however reasonable to infer from the Appellant's inaction that he was content with the pace with which things were proceeding. I am therefore not prepared in these circumstances to infer any prejudice to the Appellant.

[69] I will now turn to consider whether any prejudice has been established on the evidence. The Appellant contends that the chair treatment he endured after charges were laid is a major component of the prejudice he suffered. He also asserts prejudice based on his dismissal from the Canadian Forces and the loss of his job at a call center in Bathurst, New Brunswick, in December 2006 when he had to return to CFB Borden for his trial.

[70] With regards to the latter allegation of prejudice, involving the loss of employment at the call center, the Appellant has not persuaded me that any prejudice here can be attributed to the delay. The Appellant's testimony is that he had only been working at the call center for 2 ½ weeks. Moreover, the evidence establishes that he did not tell the employer about the court martial; instead, he stated that "I had matters that were unfinished business with the military." There is no evidence to link the employer's decision to release the Appellant to pending charges or to any delay in setting down a trial date.

[71] As to his release from the Canadian Forces, there is no evidence that this was a result of the delay. Rather, the release was in large part based on the history of problems the Appellant had during his years of service with the Canadian Forces. The merits of the challenge to his being released under the particular QR&Os provision will be settled in a different forum than this. In my view, there is no prejudice resulting from the Appellant's release from the Canadian Forces that can be ascribed to the delay before the trial.

[72] Finally, the evidence does not support the Appellant's contention that the prejudice that resulted from the chair treatment he was required to endure is linked to the delay in bringing the case to trial. The evidence establishes that the Appellant was given meaningful work upon submitting a written request nearly eleven months prior to the trial. Consequently, the chair treatment is in no way related to the post-charge delay.

[73] There is insufficient evidence here to find that the chair treatment was punishment for the two offences for which the Appellant was charged. However, the timing of the impugned

treatment certainly raises concerns relating to pre-trial punishment. The evidence establishes that the treatment was imposed shortly after the laying of the charges and not for medically related reasons. Had it been established in the evidence that the chair treatment was tantamount to pre-trial punishment, then the Appellant's right to be presumed innocent of the charges would have been undermined.

[74] On the whole of the evidence, I find that the military judge did not err in finding that the Appellant's treatment prior to his release was a punishment or was exacerbated by any delay in proceeding to trial. I also find that it was open to the military judge to conclude that the Appellant did not suffer any prejudice caused by the delay, beyond the ordinary stress and anxiety that must be endured by any accused facing serious criminal charges.

Conclusion on the appeal of the motion for a stay

[75] Upon considering and balancing the Morin factors in the circumstances of this case, and upon taking into account the interests which s. 11(*b*) of the *Charter* is designed to protect, I am of the view that the military judge did not err in concluding that the 15-month post-charge delay leading to trial, although warranting scrutiny, was not unreasonable in the circumstances. The military judge committed no palpable and overriding error in dismissing the application for a stay of proceedings. It follows that this Court's intervention is not warranted with respect to the first ground of appeal raised by the Appellant.

C. Was the Verdict Unreasonable?

Facts Relating to the Verdict

[76] Evidence supporting the charge was established mainly through the testimony of the undercover operative, Sergeant MacLeod. For the purposes of this appeal, the Appellant has conceded that the drug transactions did take place as described by Sergeant MacLeod, and thus there is no dispute as it relates to the judge accepting his evidence and basing his factual findings thereon.

[77] Sergeant MacLeod was a military policeman who took part in an investigation of drug activity at CFB Borden. He played the role of a new member of the Appellant's unit and met the Appellant through another target of the investigation. On April 8, 2005, Sergeant MacLeod asked the Appellant if he could get him "some stuff," the Appellant asked what he wanted, and Sgt. MacLeod replied that he wanted an "8-ball" of cocaine. Sergeant MacLeod then drove the Appellant into Angus, a small town near the base. During the drive, the Appellant made a call on his cell phone and stated words to the effect that the deal was to go ahead and the price would be $200.

[78] They picked up the supplier at a bar in Angus and drove to an apartment building. The Appellant left the vehicle and then returned and told Sergeant MacLeod that the price was now $220 as it was apparently the last of "the guy's stuff." Sergeant MacLeod gave the Appellant another $20 thereby paying the requested amount in full. The Appellant left and returned a few

minutes later and handed Sergeant MacLeod a bag, which contained approximately 3 grams of cocaine.

[79] On April 11, 2005, Sergeant MacLeod told the Appellant he was looking for cocaine and Ecstasy pills. The Appellant stated that he could "hook him up." Sergeant MacLeod again drove the Appellant to the same apartment building in Angus the next day after work. This time they picked up another soldier who also wanted drugs. The Appellant went in, came back out, and gave Sergeant MacLeod two "flaps" of paper containing a total of approximately one gram of cocaine. Sergeant MacLeod gave the Appellant $80 for the cocaine. Appellant gave the other soldier three "flaps" of paper.

The military judge's finding relating to the verdict

[80] The military judge began by setting out the defence theory that the Appellant's actions do not amount to trafficking because he was only acting as an agent for the purchaser of drugs. He then instructed himself on the principles relating to the burden of proof, the presumption of innocence, and reasonable doubt.

[81] He accepted the evidence of Sergeant MacLeod as it related to his dealings with the Appellant in April 2005. He discussed the defence theory in light of the Supreme Court's decision in *R. v. Greyeyes*, [1997] 2 S.C.R. 825, but found on the facts of the case that the Appellant did far more than act for the purchaser. The military judge noted that it was the Appellant who, on both occasions located a source of the supply of the cocaine, made some unspecified arrangements with a supplier of the drugs, set the price to be paid, took the purchase

money from Sergeant MacLeod, obtained the drugs from someone in the apartment building, and delivered the drugs to Sergeant MacLeod.

[82] The military judge dismissed the Appellant's argument that he merely assisted the purchaser to obtain cocaine from an unidentified supplier in the apartment building. He held that even if there was in fact a third party in the apartment, the Appellant's actions had the effect of maintaining his anonymity. In doing so, the Appellant assisted the supplier in effecting the sale and was therefore liable as a party to the offence of trafficking.

Position of the Appellant on the verdict

[83] The Appellant argues that he should not be found guilty of trafficking as he only assisted the purchaser. He bases this proposition on *Greyeyes*, above, where Justice L'Heureux-Dubé stated that "where the evidence reveals no more than incidental assistance of the sale through aiding the purchaser, a person so involved should not be treated as a trafficker, but as a purchaser."

[84] The Appellant argues that the military judge erred in concluding that he "demonstrated a concerted effort to effect the transfer of narcotics." In particular, the Appellant asserts that:

(i) the military judge seems to have ignored the fact that it was MacLeod who approached the Appellant about drugs and was eager in getting the drugs, as shown by his offers to drive the Appellant to town;

(ii) the Appellant was not in possession of narcotics; and

(iii) the judge seems to have misconstrued the evidence as he concluded that it was the Appellant who set the price of the drugs.

[85] The Appellant also contends that the judge committed a fatal error by speculating that "it is possible … that the supply of cocaine was simply stored by the accused somewhere in the apartment building and that he was merely pretending to obtain the drugs from someone else." It is argued that such a statement indicates that the judge was attaching less weight to the Appellant's statement about the unidentified seller when there was no evidence to contradict this assertion of fact. Also, the judge's conclusion that the Appellant assisted the seller by maintaining the anonymity of the seller should not have been made without having evidence on the *modus operandi* of the drug traffickers; in the alternative, this conclusion would not, in and of itself, be determinative of guilt.

[86] It is argued that that this case is similar to *R. v. Ahamad*, (2003), 181 C.C.C. (3d) 56 (Ont. S.C.) in which the accused was acquitted of a trafficking charge in a situation where he was approached by a man in a wheelchair about obtaining cocaine. The Appellant argues that the factors leading to the Court's conclusion in *Ahamad* that the accused was acting as an agent for the purchaser – that the undercover officer initiated the drug transaction, that the accused acted out of sympathy, and that the accused received no remuneration for his actions – are present in this case. On the totality of the evidence, the military judge should have found that he acted for the purchaser, not as a trafficker.

Position of the Respondent on the verdict

[87] With respect to the military judge's speculative finding about the possibility there was no other seller in the apartment building, the Respondent submits that the judge was merely expressing a concern in the impugned passage about the appropriate weight to attach to the self-serving statements of a person engaged in a drug transaction. The Respondent points out that the judge's comments immediately following the above passage demonstrate that his decision to reject the theory of the defence did not hinge on this speculation: "… but even on the theory of the defence, that the supplier of the cocaine was an unknown person in [the] apartment building, the actions of the accused had the effect of maintaining the anonymity of the supplier from [Sgt. MacLeod]." This comment shows that the judge found the Appellant guilty as a party to the offence committed by the unknown seller and therefore he could not have relied on the speculation that there was actually no seller in the building.

[88] In terms of requiring evidence about the *modus operandi* of drug traffickers, the Respondent argues that it is a matter of common sense that all persons engaged in illegal activity such as drug dealing have an interest in maintaining their anonymity. It was unnecessary for the judge to receive evidence about *modus operandi* to find that the Appellant was liable as a party to the offence by assisting the seller to maintain his/her anonymity.

[89] The Respondent denies that this case is similar to *Ahamad*, above, because the undercover police officer in that case had pretended to be confined to a wheelchair and, unlike here, there was evidence about the accused's motivation: "… he agreed to participate in criminal

activity to help the purchaser, because he believed him to be disabled, in pain and vulnerable to being victimized by people he knew to be of unsavoury character." See *Ahamad*, above at 67.

[90] Finally, the Respondent maintains that the judge's finding that the Appellant did far more than act as a purchaser was correct in fact and law. The finding was based on the undisputed testimony of Sergeant MacLeod, which the judge accepted as a whole. The Respondent contends that the judge did not disregard or misconstrue any evidence, as alleged by the Appellant. The decision is consistent with *Greyeyes,* above, and other cases that have applied the analysis of the "agent for the purchaser" defence. The Respondent submits that there was sufficient evidence before the judge to support the guilty verdicts on both charges.

Analysis

[91] The Appellant's case rests on the "agent for purchaser" defence described by the Supreme Court in *Greyeyes*, above. In that case, the accused assisted an undercover police officer both to find a source of cocaine and to buy a quantity of it, and the officer paid him for his help. The issue before the Court was whether someone either acting as an agent for a purchaser of narcotics or assisting a purchaser to buy narcotics can be found to be a party to the offence of trafficking under s. 21(1) of the *Criminal Code* by aiding or abetting in the sale of narcotics. Justice L'Heureux-Dubé, writing for the majority, held that Parliament had specifically excluded purchasers from the offence of trafficking and intended to extend that immunity to persons solely assisting the purchase. At para. 8, she states: "In situations where the facts reveal no more than incidental assistance of the sale through rendering aid to the purchaser, it stands to

reason that these persons should be treated as purchasers, and not as traffickers." However, in the circumstances of the case, she found that the accused did far more than act as a purchaser:

> The appellant located the seller, brought the buyer to the site and introduced the parties. It is clear that without this assistance, the purchase would never have taken place. Moreover, he acted as a spokesperson, negotiated the price of the drugs, and passed the money over to the seller. He also accepted money for having facilitated the deal. As my colleague points out, without the appellant's assistance, the buyer would never have been able to enter the apartment building and contact the seller. These are not the acts of a mere purchaser, and as a result it is clear that the appellant aided the traffic of narcotics.

[87] In my view the military judge did not disregard the undisputed evidence of Sgt. MacLeod. He expressly stated in his reasons: "I accept the evidence of the undercover operator, Sergeant MacLeod as to his dealings with the accused in April of 2005". I am of the opinion that the evidence of Sgt. McLeod provides the factual foundation to support the military judge's finding that the Appellant did more than act as a purchaser. His testimony clearly indicates that the Appellant determined what the buyer wanted, located the seller, brought the buyer to the site and acted as an intermediary between the parties. Moreover, the Appellant acted as a spokesperson, passed the money from the buyer to the seller, and passed the narcotics from the seller to the buyer. Without the Appellant's assistance, the transactions would not have taken place. Additionally, the judge recognized the evidence that indicated that MacLeod initiated the transaction and drove the Appellant to get the drugs. In light of the above, it is my view that the judge's findings were supported by the evidence.

[88] With respect to the speculative assertion made by the judge to the effect that there was no supplier involved, I agree with the Respondent that the military judge subsequently found that there was indeed a supplier and that the Appellant had aided in maintaining his anonymity. The speculative assertion by the military judge was, therefore, of no consequence to the verdict.

[89] There was, in my view, sufficient evidence before the military judge to support his conclusion that the Appellant aided in the transactions and was thus a party to trafficking. The verdict is supported in the evidence and is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered: *Nystrom v. R.*, 2005 CMAC 7 at paras. 51 and 88.

D. Disposition of the Appeal

[90] For the above reasons, I would dismiss the appeal.

"Edmond P. Blanchard"
Chief Justice

I agree:

"Ross Goodwin"
Ross Goodwin J.A.

I agree:

"Michael L. Phelan"
Michael L. Phelan J.A.

ANNEX

the *Queen's Regulations and Orders* (QR&Os)

107.02 – AUTHORITY TO LAY CHARGES **107.02 – POUVOIR DE PORTER DES ACCUSATIONS**

The following persons may lay charges under the Code of Service Discipline: Les personnes suivantes peuvent porter des accusations sous le régime du code de discipline militaire :

(*a*) a commanding officer; *a*) un commandant;

(*b*) an officer or non-commissioned member authorized by a commanding officer to lay charges; and *b*) un officier ou militaire du rang autorisé par un commandant à porter des accusations;

(*c*) an officer or non-commissioned member of the Military Police assigned to investigative duties with the Canadian Forces National Investigation Service.

c) un officier ou militaire du rang de la Police militaire à qui on a assigné une fonction d'enquêteur au sein du Service national d'enquêtes des Forces canadiennes.

107.03 – REQUIREMENT TO OBTAIN ADVICE FROM LEGAL OFFICER – CHARGES TO BE LAID **107.03 – OBLIGATION D'OBTENIR L'AVIS D'UN AVOCAT MILITAIRE – ACCUSATIONS À ÊTRE PORTÉES**

(1) An officer or a non-commissioned member having authority to lay charges shall obtain advice from a legal officer before laying a charge in respect of an offence that: (1) Un officier ou militaire du rang qui a le pouvoir de porter des accusations doit obtenir l'avis d'un avocat militaire avant de porter une accusation à l'égard d'une infraction qui, selon le cas :

(*a*) is not authorized to be tried by summary trial under article 108.07 (*Jurisdiction – Offences*); *a*) n'est pas autorisée à être instruite sommairement en vertu de l'article 108.07 (*Compétence – infractions*);

(*b*) is alleged to have been committed by an officer or a non-commissioned member above the rank of sergeant; or *b*) a été présumément commise par un officier ou un militaire du rang d'un grade supérieur à celui de sergent;

(*c*) if a charge were laid, would give rise to a right to elect to be tried by court martial (*see article 108.17 – Election to be tried by Court Martial*). *c*) donnerait droit à être jugé devant une cour martiale, si une accusation était portée (*voir*

l'article 108.17 – Demande de procès devant une cour martiale).

(2) The officer or non-commissioned member shall obtain legal advice concerning the sufficiency of the evidence, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge. (2) L'officier ou le militaire du rang doit obtenir un avis juridique portant sur la suffisance des éléments de preuve, sur la question de savoir si une accusation devrait ou non être portée dans les circonstances, et lorsqu'il faudrait porter une accusation, sur le choix de l'accusation appropriée.

107.09 – REFERRAL AND PRE-TRIAL DISPOSAL OF CHARGE 107.09 – RENVOI ET MESURES PRÉLIMINAIRES AU PROCÈS

(1) An officer or non-commissioned member who lays a charge shall: (1) L'officier ou le militaire du rang qui porte une accusation doit :

(*a*) refer the charge to: *a*) d'une part, en saisir l'un des officiers suivants :

(i) the commanding officer of the accused; (i) le commandant de l'accusé;

(ii) the commanding officer of the base, unit or element in which the accused was present when the charge was laid; or (ii) le commandant de la base, l'unité ou l'élément où se trouvait l'accusé au moment où l'accusation a été portée;

(iii) an officer to whom the commanding officer referred to in subparagraph (i) or (ii) has delegated powers of trial and punishment pursuant to article 108.10 (*Delegation of a Commanding Officer's Powers*); and (iii) un officier à qui le commandant visé par les sous-sous-alinéas (i) ou (ii) a délégué des pouvoirs de juger et de punir en vertu de l'article 108.10 (*Délégation des pouvoirs du commandant*).

(*b*) cause a copy of the Record of Disciplinary Proceedings to be provided to the accused. *b*) d'autre part, faire remettre une copie du procès-verbal de procédure disciplinaire à l'accusé.

(2) A delegated officer to whom a charge has been referred shall: (2) Un officier délégué qui a été saisi d'une accusation doit :

(*a*) cause the charge to be proceeded with in accordance with Chapter 108 (*Summary Proceedings*); or *a*) soit voir à ce que l'on instruise le procès en conformité avec le chapitre 108 (*Procédure sommaire*);

(*b*) refer the charge to the commanding officer with a recommendation that the charge not be proceeded with if, in the delegated officer's opinion, the charge should not be proceeded with. *b*) soit renvoyer l'accusation au

commandant en lui recommandant de ne pas donner suite à l'accusation, s'il juge qu'on ne doit pas y donner suite.

(3) A commanding officer or superior commander to whom a charge has been referred shall: (3) Un commandant ou un commandant supérieur qui a été saisi d'une accusation doit :

(*a*) cause the charge to be proceeded with in accordance with Chapter 108 (*Summary Proceedings*); or *a*) soit voir à ce que l'on instruise le procès en conformité avec le chapitre 108 (*Procédure sommaire*);

(*b*) not proceed with the charge if, in the opinion of the commanding officer or superior commander, the charge should not be proceeded with. *b*) soit, ne pas donner suite à l'accusation, s'il juge qu'on ne doit pas y donner suite.

107.11 – REQUIREMENT TO OBTAIN ADVICE FROM UNIT LEGAL ADVISER – DISPOSAL OF CHARGES 107.11 – OBLIGATION D'OBTENIR L'AVIS DE L'AVOCAT MILITAIRE DE L'UNITÉ – MESURES À PRENDRE RELATIVES AUX ACCUSATIONS

(1) A delegated officer, commanding officer or superior commander to whom a charge has been referred shall, prior to making a decision under paragraph (2) or (3) of article 107.09 (*Referral and Pre-Trial Disposal of Charge*), obtain advice from the unit legal adviser if the charge relates to an offence that (1) Un officier délégué, commandant ou commandant supérieur qui a été saisi d'une accusation doit, avant de prendre une décision aux termes des alinéas (2) ou (3) de l'article 107.09 (*Renvoi et mesures préliminaires au procès*), obtenir l'avis de l'avocat militaire de l'unité si l'accusation porte sur une infraction qui, selon le cas :

(*a*) is not authorized to be tried by summary trial under article 108.07 (*Jurisdiction – Offences*); *a*) n'est pas autorisée à être instruite sommairement en vertu de l'article 108.07 (*Compétence – infractions*);

(*b*) is alleged to have been committed by an officer or a non-commissioned member above the rank of sergeant; or *b*) a été présumément commise par un officier ou un militaire du rang d'un grade supérieur à celui de sergent;

(*c*) would give rise to a right to elect to be tried by court martial (*see article 108.17 – Election to be tried by Court Martial).* *c*) donnerait droit à être jugé devant une cour martiale (*voir l'article 108.17 – Demande de procès devant une cour martiale*).

(2) A delegated officer, commanding officer or superior commander who decides not to act on the advice provided by the unit legal adviser shall, within 30 days of receiving the advice (2) L'officier délégué, le commandant ou le commandant supérieur qui décide de ne pas suivre les recommandations de l'avocat

militaire de l'unité doit dans les 30 jours qui suit l'avis :

(*a*) state his or her decision and the reasons for the decision, in writing; and *a*) énoncer sa décision et les motifs de celle-ci par écrit;

(*b*) provide a copy of the decision and the reasons to the officer to whom he or she is responsible in matters of discipline and to the legal officer. *b*) remettre une copie de sa décision et des motifs de celle-ci à l'avocat militaire et à l'officier envers qui il est responsable pour les questions de discipline.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999) (G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

107.12 – DECISION NOT TO PROCEED – CHARGES LAID BY NATIONAL INVESTIGATION SERVICE 107.12 – DÉCISION DE NE PAS DONNER SUITE À L'ACCUSATION – ACCUSATIONS PORTÉES PAR LE SERVICE NATIONAL D'ENQUÊTES

(1) A commanding officer or superior commander who decides not to proceed with a charge laid by an officer or non-commissioned member of the Military Police assigned to investigative duties with the Canadian Forces National Investigation Service (*see paragraph* (*c*) *of article 107.02 – Authority to Lay Charges*), shall communicate the decision in writing along with the reasons for the decision to the officer or non-commissioned member of the National Investigation Service who laid the charge or the officer or non-commissioned member under whose supervision the investigation was conducted. (1) Un commandant ou un commandant supérieur qui décide de ne pas donner suite à une accusation portée par un officier ou militaire du rang de la Police militaire à qui il a été assigné une fonction d'enquêteur au sein du Service national d'enquêtes des Forces canadiennes (*voir l'alinéa c) de l'article 107.02 – Pouvoir de porter des accusations*) communique par écrit sa décision motivée à l'officier ou au militaire du rang du Service national d'enquêtes qui a porté l'accusation ou à l'officier ou au militaire du rang sous le contrôle duquel l'enquête a été conduite ou supervisée.

(2) A copy of the decision and reasons shall be provided to the officer to whom the commanding officer or superior commander is responsible in matters of discipline. (2) Une copie de la décision motivée est communiquée à l'officier envers qui le commandant ou le commandant supérieur est responsable pour les questions de discipline.

(3) If after reviewing the reasons given for not proceeding with the charge, the officer or non-commissioned member of the National Investigation Service considers the charge should be proceeded with, the officer or non-commissioned member may refer the charge directly to a referral authority in accordance with article 109.03 (*Application to Referral Authority for Disposal of a Charge*). (3) L'officier ou le militaire du rang du Service national d'enquêtes qui estime, après révision des motifs à l'appui de

la décision de ne pas donner suite à l'accusation, que l'on devrait quand même y donner suite, peut saisir l'autorité de renvoi de l'accusation conformément à l'article 109.03 (*Demande à l'autorité de renvoi de connaître d'une accusation*).

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-496
STYLE OF CAUSE:	EX-PRIVATE ALAIN FRANCIS LeGRESLEY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 19, 2007
REASONS FOR JUDGMENT BY:	Chief Justice Blanchard
CONCURRED IN BY:	Goodwin J.A. Phelan J.A.
DATED:	February 7, 2008

APPEARANCES:

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Major Anthony Tamburro	FOR THE RESPONDENT

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