Date: 20001124

Docket: CMAC-434

CORAM: **DESJARDINS**
VAILLANCOURT
LEMIEUX, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

MASTER WARRANT OFFICER R. PERRIER

Respondent

Hearing held in Ottawa, Ontario, Wednesday, November 1, 2000

Judgment rendered in Ottawa, Ontario, Friday, November 24, 2000

REASONS FOR JUDGMENT BY: **DESJARDINS J.A.**

CONCURRING: **VAILLANCOURT J.A.**

LEMIEUX J.A.

Date: 20001124

Docket: CMAC-434

CORAM: **DESJARDINS**
VAILLANCOURT
LEMIEUX, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

MASTER WARRANT OFFICER R. PERRIER

Respondent

REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This is an appeal from a decision rendered by a judge of a standing court martial who, pursuant to a preliminary motion, held that section 7 and paragraph 11(*b*) of the *Canadian Charter of Rights and Freedoms* (the "Charter") had been breached and ordered a stay of proceedings under subsection 24(1) of the Charter.

[2] The issue to be determined is whether, in the specific milieu of the Canadian Armed Forces, the period preceding the indictment of a member could, in conjunction with the period subsequent to the laying of the indictment, be considered for the purposes of determining, in this case, whether there was a breach of the right to liberty and security of the person under section 7 and the right contained in paragraph 11(*b*). If so, we must also rule as to whether the stay of proceedings constituted an appropriate remedy absent any allegations of abuse of process or breach of the right to a full answer and defence or to a fair trial.

I. The Facts

[3] The essential facts on which the military judge[1] relied in deciding the preliminary motion filed by the respondent were taken from a joint submission on the facts presented to him by the parties (VD 3)[2] as well as the testimony of the respondent.

---

1 It should be noted that article 4.09 of the *Queen's Regulations and Orders for the Canadian Forces* ("QR&O") was repealed September 1, 1999. The title "military judge" now originates in section 174 of the *National Defence Act* as amended by 1998, c. 35, s. 42, which likewise came into force September 1, 1999. See also article 112.05 of the QR&O.

2 Exhibit VD 3, transcript, Appeal Record, p. 9, l. 20.

[4] The military judge adopted the joint submission that, in the days following the commencement of a military police investigation into the disappearance of public funds, at the end of July 1997, the respondent confessed. On August 7, 1997, the respondent acknowledged, in a written statement, that he was the perpetrator of the theft of which he had initially said he was the victim. He was suspended from his military duties without pay on August 13, 1997. He had to turn in his equipment and undergo a "clearance" procedure, a word that is well-known in the military community, according to the military judge, and bears a strong resemblance to a discharge from the armed forces. The police investigation was concluded on January 27, 1998. The final report was later distributed to the military authorities concerned,[3] including the office of the assistant deputy judge advocate. The latter received it on February 24, 1998. Nothing was done, however, prior to the preparation on April 21, 1999 and the receipt on May 26, 1999 of a legal opinion on this case. On June 22, 1999, two indictments were laid against the respondent, as is indicated in the register of disciplinary proceedings.[4] After a succession of administrative errors, as they were characterized by the military judge, and a vacation period, the deputy director of military prosecutions finally laid seven further charges, which appear with the first two in the indictment of November 19, 1999. The prosecution stated it was ready to proceed as of November 30, 1999. However, it was not until January 11, 2000 that the standing court martial began hearing the matter.

---

3 See articles 106.03 and 106.11 of the QR&O, since September 1, 2000 articles 107.03 and 107.11.

4 Article 106.01 QR&O; exhibit VD 2,transcript, Appeal Record, p. 113.

[5] The military judge noted the lack of information in the joint submission as to the reasons for the delay that had elapsed between the receipt of the police report by the assistant deputy judge advocate on February 24, 1998 and the receipt of the legal opinion on May 26, 1999.[5]

[6] The respondent testified concerning the effects of his suspension without pay on his personal and professional life. He explained that in addition to the "clearance" procedure, he had to remain available at all times, which meant that he had to notify the military authorities whenever he left home for more than two hours. He stopped complying with this order after two or three months because he had registered with unemployment insurance and had to conduct job searches.[6]

II. Judgment under appeal

[7] At the outset of the hearing, the military judge was presented with an oral motion presented by the respondent:[7]

> [*Translation*]... this is... a motion based on section 7 of the Charter and, in the alternative, section 11(*b*).

[8] The respondent argued that the military judge should take into account the unexplained delay of seventeen months that had elapsed between January 27, 1998, the date when the police investigation ended, and June 22, 1999, the date when the respondent was charged, in determining whether there had been a breach of the respondent's rights. He added that he had been substantially

---

5 Transcript, Appeal Record, p. 15, l. 41-44.

6 Transcript, Appeal Record, p. 18, l. 9 to p. 19, l. 20.

7 Transcript, Appeal Record, p. 35, l. 30.

prejudiced in his personal and professional life owing to the consequences of his suspension from August 13, 1997 to the date of the trial, given the military context in which these events had occurred. However, the respondent did not claim that he had been prevented by the delay from presenting a full answer and defence or that the delay was going to affect the fairness of the trial to come. Nor did he allege that he had been the victim of vexatious or malicious proceedings that might result in an abuse of process, although close to seventeen months had elapsed during which the case had remained in the hands of the assistant deputy judge advocate.

[9] The parties were in agreement in saying that paragraph 11(*b*) of the Charter, except in certain circumstances, is intended to protect a person's rights only after he has been charged. Moreover, this principle, which was clearly laid down by the Supreme Court of Canada in *R. v. Morin*,[8] was adopted by the military judge, who stated:[9]

> [*Translation*] The court agrees that section 11(*b*) of the Charter applies only to the period that runs after the charging and until the end of the trial.

[10] The post-charge delay was not challenged as such. The military judge stated in this regard:[10]

> [*Translation*] It should be noted at this point that the defence has not alleged — at least, as the Court understood it — that the delay running from the indictment on June 22,1999 was *per se* under section 11(*b*), and using the test that was developed by the Supreme Court in *Morin*, in itself unreasonable. In fact, had it not been for the pre-charge delay, the defence would probably not have presented a motion for a stay of proceedings in connection with the period of less than six months that elapsed between June 22, 1999 and December 3, 1999, the date when the parties

---

8 [1992] 1 S.C.R. 771, at p. 789. See also *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588.

9 Transcript, Appeal Record, p. 109, l. 12-14.

10 Transcript, Appeal Record, p. 107, l. 25-43.

> agreed to proceed on January 11, 2000. Considering the events as reported in exhibit VD3, including the inherent delays and the major changes made to the military justice system, which came into force on September 1, 1999, this delay does not appear to me to be unreasonable on its face, and the prejudice suffered by the accused during these few months does not appear to be substantial.
>
> [Emphasis added]

[11] The parties thus took for granted what Sopinka J. had said on behalf of the majority of the Supreme Court of Canada in *R. v. Morin*:[11]

> Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay.

---

[11] [1992] 1 S.C.R. 771, at p. 789. See also the observations of Lamer J.(as he then was) in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 945:

> Pre-charge delay is relevant under ss. 7 and 11(*d*) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial.

[12] The military judge echoes this in the following way,[12] moreover, adding his understanding of another decision of the Supreme Court of Canada in *R. v. Finn*:[13]

> [*Translation*] The court reviewed the decisions cited by the defence in support of its submissions, and the principles that have been developed by the Supreme Court on the subject of unreasonable delay, whether before or after the laying of the charge. It is clear that the courts must in some cases take into account the pre-charge delay, and are prepared to do so, but what is clear from the decisions in *Kalanj*, *Carter* and *L. (W.K.)* is that this type of delay will not be considered, either individually or with the possible delay that would result in a section 11(*b*) inquiry, unless it has been demonstrated that there was an adverse effect on the possibility of presenting a full answer and defence, thus affecting the fairness of the trial, or that there has been an abuse of process. The *Finn* decision, cited by the prosecution, does however provide some clarification on this point because in *Finn* the Supreme Court, in upholding the decision of the Newfoundland judge, clearly suggests — by referring to the comments of Sopinka J. in *Morin* — that the pre-charge delay may also be considered when it is demonstrated that the rights of the accused under section 7 of the *Charter* have been breached, contrary to the principles of fundamental justice. Although the unexplained delay of some 17 months during which the case remained in the hands of the local AJAG reveals a high degree of inefficiency and a flagrant lack of professionalism, it has not been suggested or demonstrated by the defence that these were vexatious or malicious proceedings designed to prejudice the accused, which would result without further ado in an abuse of process, or that the accused was in a situation that rendered him incapable of presenting a full answer and defence.
>
> [Emphasis added]

---

[12] Transcript, Appeal Record, p. 105, l. 39 to p. 106, l. 24.

[13] [1997] 1 S.C.R. 10, upholding 106 C.C.C. (3d) 43 (Nfld. C.A.).

[13] What was actually at issue in reference to section 7 and, in the alternative, to paragraph 11(*b*) was the unexplained delay that had elapsed from the end of the police investigation on January 27, 1998 to the indictment of the respondent on June 22, 1999, to which was added the delay that developed after this indictment, all of this as analyzed in the military context. The military judge summarized the respondent's position as follows:[14]

> [*Translation*] The defence alleges that the entire delay is unreasonable before and after the indictment on June 22, 1999 and therefore the 17 months or so that elapsed between the end of the investigation on January 27, 1998 and the indictment on June 22, 1999 should be considered by the court in determining whether the delay is unreasonable. The defence alleges that the court ought to consider the particular features of the military justice system, including the obligation recognized in the first place by the Supreme Court, and secondly by the report of the inquiry by the Dickson group, and certainly since September 1, 1999, when the codification of section 162 of the *National Defence Act* came into force, that is, the obligation to proceed promptly or, if you prefer, with all possible speed.
>
> [Emphasis added]

[14] The military judge refers to the military context in which the events unfolded:[15]

> [*Translation*] One fact remains, nevertheless, and the Court had to consider it, and that is that the decision of the military authorities to order the suspension of the accused on August 13, 1997 had, both in its actual terms and through its consequences, effects that resemble those suffered by civilians who are charged in the civilian courts. In the cases that were cited and reviewed by the Court, it is clear that, absent the anxiety, stress and social stigmatization normally associated with a formal arraignment before the courts, this absence is seen as a factor that bars consideration of a pre-charge delay. However, the Court must acknowledge, and I think this is to a large degree what the defence is arguing, that within the military justice system, a *sui generis* system, a self-contained system as the Supreme Court has held, the circumstances may be and are in fact completely different. Here is a master warrant officer who wore his rank on his uniform and who was working full time — this is what the evidence seems to disclose — in August '97, and they decide to suspend him from his duties. He is not actually charged, but in the military community a suspension from duties, associated with a loss of pay, with a

---

14 Transcript, Appeal Record, p. 104, l. 41 to p. 105, l. 9.

15 Transcript, Appeal Record, p. 106, l. 25 to p. 107, l. 25.

> remand amounting for all practical purposes to a discharge from the Armed Forces, and with a restriction of movement preventing him from leaving his home without notifying the military authorities, apparently on the orders of a Captain Alarie, has an effect that can closely resemble an indictment with its accompanying anxiety, stress and public stigmatization, at least in the eyes of the military public. I therefore asked myself whether, after August 13, 1997, there was not a substantial breach of the rights to liberty and security of the person, rights that cannot be infringed except in accordance with the principles of fundamental justice. And one of these principles of fundamental justice, as developed by the Supreme Court back in '92 in the *Généreux* decision, is that in the military community it is imperative that justice be promptly rendered. That is one of the fundamental reasons that, as the Supreme Court says, justifies the existence of the military justice system. The consequences, both professional and personal, suffered by the accused owing to the negligence demonstrated by an unexplained delay of 17 months were greatly aggravated by the fact that the entire matter took place within a very closed military community.
>
> [Emphasis added]

[15] He then noted that there are some essential differences in the facts between the *Finn*[16] and *Kalanj*[17] cases and the case he had to determine. He stated:[18]

> [*Translation*] In the case at bar and its particular circumstances, and contrary to the submissions of the prosecution in its interpretation of the *Kalanj* and *Finn* judgments, I have felt obliged to reconsider the facts, the circumstances that were key considerations in those two cases and that led the Supreme Court to its well-known conclusions. In *Finn*, the Supreme Court endorsed the reasoning of Mr. Justice Marshall — as I mentioned earlier, of the Newfoundland Court of Appeal — who relied on the lack of evidence of anxiety, worry and stigmatization resulting from Ms. Finn's charge or restrictions in finding that the delay prior to the indictment did not count. In *Kalanj*, the Supreme Court does not seem to have been able to assess the eight-month period between the arrest and the charge and in any event the Court seems to accept the prosecution's submission that the eight months were needed in order to prepare the charges. There were some wiretap items to review, apparently a very complex charge. It should be noted here, and this is the defence's submission, that unlike the situation in which the court is unable to examine the reason for a pre-charge delay, the evidence has revealed in this case that it was not the police investigation that was the cause of the delay in charging Master Warrant Officer Perrier. I think the Supreme Court would probably have

---

16 [1997] 1 S.C.R. 10, upholding 106 C.C.C. (3d) 43 (Newfoundland C.A.).

17 [1989]1 S.C.R. 1594.

18 Transcript, Appeal Record, p. 108, l. 22 to p. 109, l. 10.

> assigned greater importance to the pre-charge delays in the *Kalanj* and *Finn* cases if, as is the case here, there had been evidence that this type of delay had exacerbated the consequences of anxiety, restriction of freedom and stigmatization that have been demonstrated in our case and if the prosecution had continued to be unable to justify or even to explain the smallest part of these 17 months.
>
> [Emphasis added]

[16] The cause of the delay in charging the respondent was therefore not the police investigation, according to the military judge, but rather the military's unexplained delay in taking action following receipt of the report of the police investigation.

[17] The military judge then announced his conclusions as to a breach of section 7 of the Charter:[19]

> [*Translation*] ... I am of the opinion, however, that in the present circumstances, and relying on the principles of fundamental justice under section 7 of the Charter, the prosecution — starting with the accused's commanding officer, who had told the accused orally that he would be suspended from duty, proceeding through the military lawyers involved in the case from the beginning, and extending to the deputy Director of Military Prosecutions — did not proceed with the necessary expeditiousness. The 24 months or so — by my calculation — that elapsed from the conclusion of the investigation, which by the way was not particularly complex given the accused's confessions back in August 1997, those 24 months clearly prejudiced the accused's right to liberty and security of the person.
>
> [Emphasis added]

[18] After describing at length the prejudice suffered by the respondent, he concludes:[20]

> [*Translation*] In this specific case, I find that the pre-charge delay can and should be considered along with the six-month delay that followed this indictment owing to the pernicious and ongoing effects since August 13, 1997 that have been proved in this Court. In this specific case, having regard to the very special measures of

---

[19] Transcript, Appeal Record, p. 109, l. 13-29.

[20] Transcript, Appeal Record, p. 109, l. 30 to p. 110, l. 10.

> suspension, loss of pay, restriction of mobility that were a cause of anxiety, stress, dishonour and stigmatization in the professional military community, the powerlessness in the face of the military machine, the health problems, the decline in income, and the difficulty in securing worthwhile and remunerative civilian employment, the military authorities, without exception, had an obligation to act with infinitely greater rapidity than they did. When you take it upon yourself to control people's lives by confining them to their residence and pointing out to them that they remain under the control of the military authorities, when you suspend a soldier so definitively on the strength of a police investigation, you must ensure that at the very first opportunity the results of that investigation will be taken before a military tribunal through the laying of a formal charge or you decide that charges will not be laid and you put an end to the special procedures taken in regard to the suspect. In this sense, the military authorities breached the rights of the accused under section 7 primarily and section 11(*b*) of the Charter.
>
> [Emphasis added]

[19] The military judge explained that in his calculation of twenty-four months he was taking into account the seventeen months from the end of the police investigation on January 27, 1998 to the indictment on June 22, 1999, to which he added the six months subsequent to the indictment and, in addition, he stated that owing to the respondent's suspension from his military duties, a suspension that strongly resembled an indictment, the initial delay was to run from August 13, 1997, the date of the suspension. These three periods together constituted, he said, a breach of the rights " [*Translation*] under section 7 primarily and section 11(*b*) of the Charter".

[20] The military judge explained again that within the quite unique military system, the accused, who had already confessed his liability, was to all intents and purposes "already charged as of August 13, 1997", the date of the suspension, thus displacing, in a figurative way, the date of the indictment. He then went back to the period that had elapsed since the end of the police

investigation, on January 27, 1998, to June 1999, the date of the indictment, a period that he added to the six months elapsed from the date of the indictment to the trial:[21]

> [*Translation*] When all is said and done, having regard to the special measures taken on August 13, 1997 and the circumstances surrounding the implementation of these measures, I find that while they were not formal charges such as those laid on June 22, 1999, by its context and within the quite unique military system, the accused was for all intents and purposes already charged as of August 13, 1997. His confessions were known to the military authorities and the suspension was simply the concrete expression of the opinion that had already formed concerning his involvement in the disappearance of large amounts of money. I feel justified, therefore, in considering that the period from February '98 to June '99 should be added to the period that followed. It is not my intention here to criticize the decision of the military authorities to suspend the accused in the circumstances. But that notwithstanding, when such measures are taken, measures that can I think be characterized as exceptional, and they result in actual and demonstrated prejudice to the accused, the military authorities are obliged to act and to ensure that the matter is followed through with infinitely greater rapidity. So I have no option but to apply to this aforesaid unreasonable delay the test developed by the Supreme Court in the *Morin* case.
>
> [Emphasis added]

[21] Finally, he concluded that " [*Translation*] apart from the two or three months, in some cases four months, that were still needed in which to prepare a case that was relatively simple nonetheless, and to take it to court, the delay considered by the Court is more than 20 months." This delay attributable to the prosecution was in his opinion unreasonable, given the " [*Translation*] clear and uncontested" evidence of serious prejudice suffered by the accused.

---

[21] Transcript, Appeal Record, p. 110, l. 11.

[22] When it came to ruling on the appropriate remedy under subsection 24(1) of the Charter, he stated:[22]

> [*Translation*]
> The charges that appear on the indictment are on their face extremely serious and society has an interest in seeing that the accused are brought to justice. But it is also in the interest of society that the accused be brought to justice rapidly, parallel to the interest of the accused himself to be tried within a reasonable period. I must therefore ask myself in this case, in a balancing exercise, whether the seriousness of the charges and the interest of society in having a judicial resolution of these charges are more important than the prejudice suffered by this accused person since August 1997. If the accused had been formally charged as early as January 27, 1998, or in the days that followed the submission of the police report, and they had waited until yesterday to begin the trial, the exercise of balancing between these opposing interests would be as quick and simple as possible, given, among other things, such judgments as the *Askov* decision of the Supreme Court.
>
> For the reasons given earlier, and in view of the use the Court has chosen to make of the delay preceding June 22, 1999, the Court has no choice, given the serious prejudice suffered by the accused for more than two years and the deplorable way in which he was literally abandoned, notwithstanding the *prima facie* gravity of the charges, the Court has no choice but to find that the remedy sought by the defence is justified. I therefore order a stay of the proceedings under section 24(1) of the Charter in relation to the charges against Master Warrant Officer Perrier.

III. Grounds of appeal

[23] The appellant essentially submits that the military judge erred in stating that the rights of the respondent had been breached pursuant to section 7 and paragraph 11(*b*) of the Charter and in ordering the stay of proceedings pursuant to subsection 24(1) of the Charter, this extreme remedy not being justified in the circumstances according to the appellant.

IV. Relevant constitutional provisions

[24] Section 7, paragraph 11(*b*) and subsection 24(1) of the Charter read as follows:

---

[22] Transcript, Appeal Record, p. 111, l. 1-30.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit:
[...] (*b*) to be tried within a reasonable time;	[...] *b*) d'être jugé dans un délai raisonnable;
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

V. Analysis

(A) Section 7 and paragraph 11(*b*) of the Charter

[25] The appellant concedes that section 7 has a general character while paragraph 11(*b*) is more specific. But she argues that the military judge overlooked the analysis that should be made of these sections according to the instruction of the Supreme Court in *Finn*. In that judgment, she says, the Court adopted the comments made by Mr. Justice Marshall on behalf of the Newfoundland Court of Appeal. According to Marshall J.A., the notions of "liberty" and "security of the person" are also found in paragraph 11(*b*)[23] and should be interpreted in the context of that paragraph when a delay is at issue, whether subsequent or prior to the laying of a charge.

[26] The appellant reminds us that *Finn* had to do with an alleged violation under paragraph 11(*b*) of the Charter and that Marshall J.A. first refers to the applicable law under that provision:[24]

---

[23] See in particular *R. v. Finn* (1996), 106 C.C.C. (3d) 43, at p. 61.

[24] (1996), 106 C.C.C. (3d) 43, at p. 60.

> The starting-point in referencing the relevant law is the clear direction given by the Supreme Court of Canada that the length of delay in the context of s. 11(*b*) of the Charter is to be reckoned from the date of the charge to the completion of the trial.

[27] The appellant says that Marshall J.A. then went on to observe:[25]

> [...] As has been mentioned, the trial judge acknowledged that this was the approach the law required to be adopted at the inception of his judgment.
>
> However, he also recognized a qualification to this otherwise absolute statement of the relevant time-frame. In special circumstances the law allows pre-charge delay to have a bearing upon assessment of the reasonable timeliness of a trial. As indicated, the trial judge purported to be following authority in giving weight to the pre-charge delay in his assessment of the constitutional timeliness in this case. That authority was a statement which he quoted from *Morin* that was made by Sopinka J. where the latter asserts at p. 14 that the period preceding the laying of the charge:
>
> > ... may in certain circumstances have an influence on the over-all determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay.
>
> In view of the judge's use of pre-charge delay in this case, it is necessary to inquire whether the "certain circumstances" justifying its consideration exist here. Identification of the type of circumstances the statement envisages is aided by reference to Sopinka J.'s subsequent commentary in *Morin* detailing the individual rights which s. 11 (*b*) seeks to protect. In ensuing remarks at p. 12 of his judgment in that case, Sopinka J. identifies them as the rights to security of the person; to liberty; and, to a fair trial. He then elaborates as follows:
>
> > The right to security of the person is protected in s. 11(*b*) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.
>
> From this breakdown of the component elements of the protection which this Charter provision is designed to assure, it can readily be seen that any deprivation of the first two categories can only arise from circumstances occurring in the post-charge time period. This is because the state does not put the individual's security and liberty in jeopardy in the context of these rights until he or she has been

[25] (1996), 106 C.C.C. (3d) 43, at pp. 61-62.

> charged and exposed to criminal proceedings. Thus the anxiety, concern and stigma and the restrictions on liberty mentioned in the foregoing passage can only be relevant to the post-charge period. Hence, pre-charge delay can have no relevance in testing whether these two individual rights have been impaired. Thus, the statement in the earlier passage signifying that pre-charge delay is "not counted in determining the length of delay" must be considered as asserting that that period is neither directly nor indirectly to have any import in assessing whether the individual's right to security of the person, or his or her right to liberty, have been infringed.
>
> The third identified element rests on a different footing, however. It cannot be said that the right to a fair trial, in contrast with the other individual rights comprehended by s. 11(*b*), is incapable of being prejudicially influenced by events occurring during the pre-charge period. Where that delay adversely impinges, for example, upon an accused's right to make full answer and defence, the time span prior to the charge would have an obvious impact on the fairness of the trial. The concern that an accused's right to full answer and defence be unimpaired can be said to go to the very crux of the purposes of guaranteeing trial within a reasonable time under s. 11(*b*). Indeed, it is reasonable to hold that no Charter of fundamental rights would be complete without the basic assurance of the opportunity of full answer and defence on being charged with a criminal offence. The protection against impairment of that right indubitably must be construed as lying at the very kernel of any constitutional guarantee to be tried within a reasonable time.

[28] Finally, the appellant notes this conclusion of Mr. Justice Marshall:[26]

> The foregoing discussion shows that this leeway to so consider pre-charge delay must be construed as applicable only where it has had an effect on the right to full answer and defence, or on some other circumstance affecting the integrity and fairness of the trial.

[29] The appellant says the military judge failed to consider the ratio in the *Finn* case.

[30] I do not think it is necessary to limit the scope of section 7 in this way. The *Kalanj* case shows, on the contrary, that section 7 has a more general scope than paragraph 11(*b*) of the Charter, which is more specific, and that both can have a distinct role depending on the case.

---

[26] (1996), 106 C.C.C. (3d) 43, at p. 63.

[31] In *R. v. Kalanj*,[27] Mr. Justice McIntyre, on behalf of the Supreme Court of Canada, noted that section 7 of the Charter guarantees the general "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". And he added:[28]

> This section applies at all stages of the investigatory and judicial process.
>
> [Emphasis added]

[32] In regard to section 11, he also stated:[29]

> In dealing with s. 11, it must first be recognized that it is limited in its terms to a special group of persons, those "charged with an offence". It deals primarily with matters relating to the trial.
>
> [Emphasis added]

---

[27] [1989] 1 S.C.R. 1594, at p. 1608.

[28] [1989] 1 S.C.R. 1594, at p. 1608.

[29] [1989] 1 S.C.R. 1594, at p. 1608.

[33] Continuing with his analysis, McIntyre J. noted that the purpose of section 11 was also to afford protection for the liberty and security interests of persons accused of crime, but that it did so "within its own sphere".[30] It was not the sole guarantor or protector of such rights, nor was it intended to be. Section 7 afforded broad protection for liberty and security, while the other sections, particularly those dealing with legal rights, applied to protect those rights in certain circumstances. He added:[31]

> The purpose of s. 11(*b*) is clear. It is concerned with the period between the laying of the charge and the conclusion of the trial and it provides that a person charged with an offence will be promptly dealt with.
>
> The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made. Circumstances will differ from case to case and much information gathered in an investigation must, by its very nature, be confidential. A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence. It is notable that the law -- save for some limited statutory exceptions -- has never recognized a time limitation for the institution of criminal proceedings. Where, however, the investigation reveals evidence which would justify the swearing of an information, then for the first time the assessment of a reasonable period for the conclusion of the matter by trial becomes possible. It is for that reason that s. 11 limits its operation to the post-information period. Prior to the charge, the rights of the accused are protected by general law and guaranteed by ss. 7, 8, 9 and 10 of the Charter.
>
> [Emphasis added]

---

30 [1989] 1 S.C.R. 1594, at p. 1609 [emphasis added].

31 [1989] 1 S.C.R. 1594, at pp.1609-10.

[34] I draw two major conclusions from the comments of McIntyre J.: the first being that section 7 plays a general role while section 11 is more specific; the second being that where the investigation reveals evidence that would justify the swearing of an information, it then becomes possible to assess what is a reasonable period. I would add that since *Re B.C. Motor Vehicle Act*,[32] it is trite law that the words "principles of fundamental justice" are substantive and not just procedural. It is appropriate to recall what Lamer J. (as he then was) wrote on this matter:[33]

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

[35] In *R. v. White*,[34] Mr. Justice Iacobucci, on behalf of the majority, recalls the three major steps that a court must take in its analysis of section 7. These steps or stages correspond to the structure of the provision. First, the court must ask itself whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. Secondly, it must identify and define the relevant principle or principles of fundamental justice. Finally, it must determine whether the deprivation has occurred in accordance with the relevant principle or principles. Iacobucci J. adds:[35]

---

[32] [1985] 2 S.C.R. 486.

[33] [1985] 2 S.C.R. 486, at p. 512.

[34] [1999] 2 S.C.R. 417, at p. 436.

[35] [1999] 2 R.C.S. 417, at p. 436.

> Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

[36] In the case at bar, the military judge noted the respondent's obligation to notify the military authorities of his outings if they were for longer than two hours. He held that this was an infringement of the respondent's liberty. He considered the effects of the suspension on the respondent's private life. He referred to the criteria of anxiety, stress and social stigmatization cited by Sopinka J. in *Morin* and referred to by Marshall J.A. in *Finn*. He concluded that there was an infringement of security of the person. However, he did not question the justification for measures taken by the military authorities. He did question whether these infringements were contrary to the principles of fundamental justice and, if so, which of these principles had been breached.

[37] I agree with the appellant, in one sense, when she submits that the military judge erred somewhat in citing G*énéreux*[36] as holding that "[*Translation*] in the military community it is imperative that justice be promptly rendered."[37] What Lamer C.J. actually said in *Généreux*[38] is this: 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. As Lamer C.J. stated:[39]

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of

---

[36] *R. v. Généreux*, [1992] 1 S.C.R. 259.

[37] Transcript, Appeal Record, p. 107, l. 16-17.

[38] *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 293.

[39] *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 293.

> the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. 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.

[38] Speediness of action was envisaged by Lamer C.J. from the perspective of an institutional approach rather than in terms of the rights of an accused. But the two go together. An efficient justice system compatible with the rule of law benefits both the Armed Forces and those who serve in its ranks. From this perspective, the military judge was not wrong in expressing himself as he did.

[39] The respondent's confessions were known as of August 7, 1997. He was suspended without pay on August 13, 1997. The military then put the respondent on hold for seventeen months without ever providing any explanation of the reasons for this delay. This, in the opinion of the military judge, indicated a high degree of inefficiency and a blatant lack of professionalism. Yet the military, unlike a civilian employer, do have the authority to prosecute. Once the police investigation had ended, on January 27, 1998, and in view of the respondent's confessions, it was then possible, as McIntyre J. put it in *Kalanj*, *supra*, to assess whether the delay was reasonable. In this case, the military judge held that the principles of fundamental justice recognized in section 7 required that the appellant proceed within a reasonable period, and this she had not done.

[40] The appellant submitted that the military judge could not add to his conclusion concerning section 7 the words "[*Translation*] and section 11(*b*) of the Charter". The appellant notes that paragraph 11(*b*) applies only to the periods following the laying of a charge and that the respondent

and the military judge himself took it for granted that the six-month period subsequent to the laying of the charge on June 22, 1999 was not unreasonable.

[41] It was the respondent's submission, however, that the military judge probably intended to use paragraph 11(*b*) as a benchmark. The motion before him was based on section 7, but it was also consistent in nature with paragraph 11(*b*) since the latter deals with reasonable time and certain parallels could be drawn with that paragraph.

[42] The military judge did explain that following the respondent's suspension, on August 13, 1997, he was "[*Translation*] for all intents and purposes already charged"[40] as of that date. By referring in an ancillary way to paragraph 11(*b*), the military judge was simply illustrating again the proposition he had expressed earlier, namely, that within the military community a suspension has effects that resemble an indictment in the civilian courts. That is the sense in which I understand his use of paragraph 11(*b*). To my way of thinking, this was not an error of law, as the appellant claims, but rather a comparison with civilian life, since the respondent had not been formally charged in accordance with the military procedure. It illustrates the harshness of the measures that may and must be taken in the military community, a harshness that was echoed by Lamer C.J. in *Généreux*, an excerpt of which I cited earlier.

---

[40] Transcript, Appeal Record, p. 110, l. 16.

[43] The military judge disposed of section 7 "primarily"[41] by applying, correctly in my view, the teachings of the Supreme Court of Canada as they apply to pre-charge delays. He was justified in disregarding the conclusions reached by the Supreme Court of Canada in *Finn*, since the facts before him differed. He was, however, justified in applying the guidelines therein. Irrespective of whether or not he erred in adding to his principal conclusion an ancillary conclusion in reference to paragraph 11(*b*), the correctness of his principal conclusion is not, in my opinion, at issue.

[44] The military judge determined that the respondent's section 7 rights had been infringed, that this infringement was contrary to the principle of fundamental justice that requires speedy justice, and that the delay had never been explained. The military judge, in my opinion, met the three analytical tests laid down by Iacobucci J. in *White*. I recall the words of Iacobucci J., quoted earlier, and apply them to this case:[42]

> Where a deprivation of life, liberty, or security of the person has occurred ... in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

[45] However, the appellant submitted that the military judge ruled in the absence of any evidence as to the reaction of the military community to the respondent's suspension. It must be noted that there is indeed a lack of evidence as to the stigmatization by the military community other than the feeling of abandonment experienced by the respondent, about which he testified.

---

41 Transcript, Appeal Record, p. 110, l. 9.

42 [1999] 2 S.C.R. 417, at p. 436.

[46] It is interesting to note that in an entirely different context, that of bias, some of the judges of the majority of the Supreme Court of Canada in *R. v. S.(R.D.)*[43] seem to agree that a judge's life experience can be the object of some transparency. In this sense, the words used by the military judge served only to express his perception of life in the military community. However, for the purposes of this case, I would tend to agree with the judges of the Supreme Court of Canada minority, who hold that a trial judge should base his findings on the evidence that is presented to him.[44]

[47] This error of fact — which is unreasonable because it is unsupported by any evidence — is not substantial. It is isolated and does not affect the general conclusion reached by the military judge that there was evidence of an infringement suffered by the respondent of his Charter-protected rights.

[48] Finally, the appellant argued that the military judge erred in his interpretation of the expression "without pay" in the context of a suspension ordered under article 19.75 of the QR&O.[45] She explains that the financial provisions in relation to suspension from duty are contained in chapter 208, and in particular articles 208.01, 208.03 and 208.07.[46] For example, an officer or non-commissioned member suspended from his military duties retains his entitlement to pay. Only the immediate payment of his pay is restricted under article 208.07 of the QR&O. The expression

---

43 [1997] 3 S.C.R. 484, par. 39 and 119.

44 [1997] 3 S.C.R. 484, par. 13.

45 Vol. I (Administration) of the QR&O.

46 Vol. III (Finance) of the QR&O.

"without pay", says the appellant, can only be interpreted in terms of a subsequent decision made by the authority that ordered the suspension in relation to the payment of the said pay, a decision that will be made under article 208.43 of the QR&O. Yet nothing of that nature had occurred at the time the hearing began.

[49] When he used the expression "without pay", the military judge was simply repeating the words used in paragraph 13 of the joint submission of facts. The respondent stated that he had not been receiving any money since his suspension from duty. I do not think that in using the term "without pay" the military judge overlooked the QR&O and thereby contravened Rule 15(2) of the *Military Rules of Evidence*.

B. Appropriate remedy under subsection 24(1) of the Charter

[50] The appellant submits that a distinction must be made between the decisions of the Supreme Court of Canada dealing with a breach of section 11 of the Charter, in which case the stay of proceedings has generally been held to be the only possible remedy,[47] and the Supreme Court's rulings on the remedy consequent to a breach of the section 7 rights, in which case, she says, the stay of proceedings should be handed down only in extreme instances.

[51] The appellant cites in her support *R. v. O'Connor*, a criminal case,[48] in which Madam Justice L'Heureux-Dubé, on behalf of the majority, states:[49]

---

47 See *R. v. Rahey*, [1987] 1 S.C.R. 588, *R. v. Askov*, [1990] 2 S.C.R. 1199.

48 As to a stay of proceedings in administrative law, see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

49 [1995] 4 S.C.R. 411, at pp. 460-61.

> It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases.

[52] A little further on, L'Heureux-Dubé J. sets out some possible guidelines for a trial judge to use in determining the appropriate and just remedy where it is warranted. She states, at page 465:

> Where there has been a violation of a right under the *Charter*, s. 24(1) confers upon a court of competent jurisdiction the power to confer "such remedy as the court considers appropriate and just in the circumstances". Professor Paciocco, *supra*, at p. 341, has recommended that a stay of proceedings will only be appropriate when two criteria are fulfilled:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.
>
> I adopt these guidelines, and note that they apply equally with respect to prejudice to the accused or to the integrity of the judicial system.

[53] The courts' excessive readiness to order stays of proceedings has of course been criticized by legal scholars.[50] In rebuttal, the respondent referred us to *R. v. Rahey*.[51] Although that case involved a breach of paragraph 11(*b*) of the Charter, Lamer J. (as he then was) nevertheless stated:[52]

> After the passage of an unreasonable period of time, no trial, <u>not even the fairest possible trial,</u> is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the *Charter*.

---

[50] See p. Hogg, *Constitutional Law of Canada* (3rd ed.), Vol. 2 (Toronto: Carswell, 1997), at p. 49-12, par. 49.10.

[51] [1987] 1 S.C.R. 588.

[52] [1987] 1 S.C.R. 588, at p. 614.

[Emphasis added]

[54] It must be acknowledged, however, that at a later point[53] Lamer J. essentially subscribed to the statement by Martin J.A. in *Re Regina and Beason*[54] that a court could also, depending on the case, order a trial to be held at an early date and not order a dismissal unless the prosecution failed to proceed at that time.

[55] However, in the case at bar the military judge, "[*Translation*] in a balancing exercise",[55] weighed the seriousness of the charges and the interest of society, on the one hand, against the prejudice suffered by the respondent since his suspension from duty in August 1997 on the other hand. In view of the lengthy unexplained delay that had elapsed prior to the indictment of June 22, 1999 as well as the subsequent delay, he ordered, in the exercise of his discretion, the stay of proceedings.

[56] In my opinion, the military judge guided himself correctly in his analysis. There was evidence that enabled him to reach the conclusion he drew. The respondent had admitted his misconduct and been suspended. Nevertheless, he was not charged by the military until long after the conclusion of the police investigation. Having noted the serious prejudice suffered by the respondent during this period, the military judge was entitled to think that the respondent had been sufficiently tried and tested and that the interest of society did not require more. He held that a stay of

---

53 [1987] 1 S.C.R. 588, at pp. 614-15.

54 (1983), 7 C.C.C. (3d) 20, at p. 43 (Ont. C.A.).

55 Transcript, Appeal Record, p. 111, l. 8.

proceedings was an appropriate and just remedy in the circumstances. I do not think that any higher principle would warrant a court of appeal to intervene in this balancing exercise.

VI. Conclusion

[57] I would dismiss this appeal.

"Alice Desjardins"

J.A.

"I concur with these reasons
Jacques Vaillancourt J.S.C."

"I concur with these reasons
François Lemieux J."

Certified true translation

Suzanne M. Gauthier, LL.L., Trad. a.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO:	CMAC-434
STYLE:	Her Majesty the Queen v. Master Warrant Officer R. Perrier
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 1, 2000
REASONS FOR JUDGMENT BY:	Desjardins J.A.
CONCURRING:	Vaillancourt J.S.C. Lemieux J.
RENDERED:	November 24, 2000

APPEARANCES:

Lieutenant-Colonel M. Dutil Major D'auteuil	FOR THE APPELLANT
Lieutenant-Colonel Denis Couture Captain McMahon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Office of the Judge Advocate General Ottawa, Ontario	FOR THE APPELLANT
Office of the Judge Advocate General Ottawa, Ontario	FOR THE RESPONDENT