Citation: *R. v. ex-Private A.F. Legresley, 2006 CM 39*

Docket: C200639

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE BORDEN

Date: 14 December 2006

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
EX-PRIVATE A.F. LEGRESLEY
(Accused)

DECISION IN RESPECT OF AN APPLICATION FOR A STAY OF PROCEEDINGS ON THE GROUNDS OF A VIOLATION OF THE RIGHTS GUARANTEED UNDER SECTION 7 AND 11(b) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.
(Rendered orally)

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[1] At the opening of his trial by Standing Court Martial on two charges of trafficking cocaine, and prior to plea, the accused, former Private Legresley, applied for a stay of proceedings on the grounds of a violation of his rights under section 7 and 11(*b*) of the *Canadian Charter of Rights and Freedoms*, arguing that his right to trial within a reasonable time was infringed or denied. Yesterday I announced a ruling dismissing the application for the reasons that follow.

[2] The evidence on the application consisted of an Agreed Statement of Facts, exhibit VD1-15; a number of documentary exhibits; and the evidence of the accused, former Private Legresley, whom I will refer to as the applicant, and Sergeant Currier. The prosecution called the evidence of Sergeant Turner, who was the investigating officer, and Captain Janes, who was the applicant's Company Commander.

[3] In a ruling I made in the case of *Bombardier Wolfe,* in Gagetown, on 24 August 2005, I stated:

> [10] The *Canadian Charter of Rights and Freedoms* provides in section 11(*b*):
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> 11. Any person charged with an offence has the right
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> ...
>
> (*b*) to be tried within a reasonable time;
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> Section 11(*b*) protects the interests of accused persons by advancing the rights to liberty, to security of the person, and to make full answer and defence. As well, Canadian society as a whole has an important interest in seeing that criminal prosecutions are dealt with without undue and unreasonable delay.
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> [11] In *R. v. MacDougall*, [1998] 3 S.C.R. 45, McLachlin J, as she then was, delivered the judgement of the Supreme Court of Canada. At paragraph 29, she wrote:
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> > 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.
>
> And at paragraph 30 ...
>
> > The societal interest protected by s. 11(*b*) has at least two aspects.... First, there is a public interest in ensuring a speedy trial, so that criminals are brought to trial and dealt with—possibly through removal from the community—as soon as possible. Second, there is a public interest in ensuring that those on trial are dealt with fairly and justly. This societal interest parallels an accused's "fair trial interest".
>
> [12] The right to trial within a reasonable time arises at the time a charge is laid, but it is obvious that no trial can proceed immediately upon charges being laid. Both parties will require some time to marshal the evidence for presentation to the court, to consider their respective positions, and to bring any pretrial proceedings that may be thought necessary. In addition, of course, a court system must be in a position to accommodate the hearing of the trial with the necessary physical facilities and personnel, including a judge. All

> these matters take time and, therefore, cause delay. The *Charter* does not mandate that there be no delay between charges and trial, only that any such delay be reasonable.
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> [13] What is meant by the term "reasonable time" in this context? The Supreme Court of Canada has set out the analytical framework. There are four principal factors that the court must examine and consider to determine whether, in a particular case, the time taken to move a case to trial is unreasonable. These factors ...[A]re:
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> 1. The length of the delay from the time charges are laid until the conclusion of the trial;
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> 2. Waiver of any periods of time;
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> 3. The reasons for the delay; and
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> 4. Prejudice to the accused.
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> In its consideration of the reasons for delay, the court must look at:
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> 1. The inherent time requirements of the case;
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> 2. The actions of the accused and of the prosecution;
>
> 3. Limits on institutional resources; and
>
> 4. Any other reasons for delay.
>
> [14] These factors guide the court in its determination, but they are not applied in a mechanical way, nor should they be considered as immutable or inflexible, otherwise this provision of the *Charter* would simply become a judicially imposed statute of limitations upon prosecutions.
>
> [15] It is not simply the periods of delay that the court is concerned with. Rather, it is the effect of delay on the interests that section 11(*b*) is designed to protect. In assessing the effect of delay, it is important to remember that the ultimate question to be decided is the reasonableness of the overall delay between the time charges are laid and the conclusion of the trial.
>
> [16] These principles ... developed in Canadian civilian courts, but they apply equally to military cases under the Code of Service Discipline contained in the *National Defence Act.*

[4] The period of delay in the present case starts with the laying of the charges on 21 September 2005. The applicant submitted that the period of delay should begin with the date of the arrest of the accused on 19 April of that year, because within a matter of days of

that date, the prosecution was in possession of all the evidence required to support a prosecution.

[5] In my view, the law is clear that the period to be examined begins with the laying of charges, as it is only then that the accused is in jeopardy of being found guilty. There is no authority of which I am aware that would require the prosecution to proceed with charges as soon as it can be said that there is a case for prosecution. Thus the period of time in issue is almost 15 months, from 21 September 2005 until mid-December of 2006, when the trial was scheduled.

[6] The prosecution concedes, and I agree, that this time period is sufficiently long to require an examination of the other factors set out in the case of *R. v. Morin* in the Supreme Court of Canada.

[7] The prosecution does not argue for a waiver by the defence of any portion of the time period in issue. The principle reasons for the delay to trial in the present case appear to have been the unavailability of judicial resources at the time of the preferring of the charges to court martial in February of 2006 until early October of 2006, when the Deputy Court Martial Administrator enquired of counsel as to their availability for trial; a change of the assigned prosecutor in September of 2006; and a change of defence counsel at about the same time.

[8] In the circumstances of this case, I do not attach significance to the unavailability of judicial resources as it appears that, for different reasons, the parties, themselves, were not ready to go to trial until October of 2006. Thereafter, trial time was set reasonably promptly for December.

[9] Much of the evidence and argument was addressed to the issue of prejudice said to have been suffered by the applicant. I find on all the evidence that the applicant was not tasked with meaningful work from the time shortly after his arrest on these charges, on 19 April 2005, until he formally complained in writing of the situation in January of 2006, and was given useful work to do some weeks later. I also find that during this period of some eight months, the applicant was required to report daily and sit on a chair outside the company office throughout the workday. But I am not satisfied that either the lack of tasking or the requirement to remain seated was a punishment imposed administratively as a result of the allegations of drug trafficking. Neither party led evidence in the course of the *voir dire* from anyone who ordered the applicant to remain seated for months on end. In the absence of such evidence, I cannot conclude that this was a punishment, or that this treatment was exacerbated by any delay in proceeding to trial.

[10] Exhibit VD1-9 sets out the grounds upon which the unit recommended the release of the applicant from the Canadian Forces in March of 2006. There can be no doubt that there was many factors, including allegations that form the substance of the charges before the court, that supported the proposed release of the applicant. I do not consider that his liability to be released was a form of prejudice engaging the right to trial within a reasonable time, nor do I accept the submission that an earlier trial would have resulted in the correction of several misstatements of fact contained in the recommendation for release. Even if the applicant should have been released on medical grounds, this does not constitute prejudice related to the timing of the trial. It is simply irrelevant to the question of prejudice under a section 11(*b*) analysis.

[11] In summary, I do not find any prejudice in this case, apart from the ordinary stress and anxiety that is part and parcel of having to face serious criminal charges. There is no evidence that the applicant has suffered unduly by reason of the length of time it has taken to bring this case to trial. On all the evidence, I am not satisfied that the applicant has established a violation of his *Charter* guaranteed rights, and, accordingly, the application was dismissed.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major J. Caron, Regional Military Prosecutions Eastern
Counsel for Her Majesty The Queen
Lieutenant-Colonel J.E.D. Couture, Directorate of Defence Counsel Services
Counsel for ex-Private Legresley