COURT MARTIAL

Citation: *R. v. McGregor*, 2019 CM 4011

Date: 20190528
Docket: 201826

Standing Court Martial

Canadian Forces Base Esquimalt
Esquimalt, British Columbia, Canada

Between:

Corporal C.R. McGregor, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander J.B.M. Pelletier, M.J.

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the persons referred to in the charge sheet as "C.R.", "K.G." and "M.S." shall not be published in any document or broadcast or transmitted in any way.

RULING ON DEFENCE APPLICATION FOR EXCESSIVE DELAY IN VIOLATION OF THE ACCUSED RIGHTS UNDER SECTION 11(*b*) OF THE *CHARTER*

(Orally)

Introduction

[1] The defence is seeking a stay of the proceedings of this Standing Court Martial for excessive delay. Indeed, as of today, it has been over 24 months since Corporal McGregor has been charged and findings have not yet been made. This period of time is

well in excess of the ceiling of 18 months after which the delay is presumptively unreasonable.

Facts and context

[2] The circumstances of this application are unusual. Corporal McGregor was charged on 10 May 2017. The proceedings of this Standing Court Martial began on 10 September 2018 following the preferral of seven charges. Five of those are laid under section 130 of the *National Defence Act* (*NDA*) including one charge of sexual assault, two charges of voyeurism and two charges for possession of a device for surreptitious interception of private communication. Two of these charges pertain to offences allegedly committed in the United States and are therefore laid under paragraph 130(1)(b) of the *NDA*, while those charges pertaining to offences committed in Canada are laid under paragraph 130(1)(a). The other two charges allege disgraceful conduct and conduct to the prejudice of good order and discipline under sections 97 and 129 of the *NDA*.

[3] Following the hearing and determination of several applications, the accused pleaded not guilty on 13 September 2018. The prosecution's evidence was heard from 13 to 17 September 2018. The defence presented no evidence. The Court closed to consider its findings in the afternoon of 18 September 2018, following the arguments of counsel.

[4] This application is submitted while the Court is still closed to determine its findings and the delay continues to accumulate as the Court is unable to make findings on two of the charges before it. Indeed, on 19 September 2018, as findings were about to be delivered in this case, the Court Martial Appeal Court (CMAC) rendered its decision in *R. v. Beaudry*, 2018 CMAC 4 (CMAC *Beaudry*) declaring paragraph 130(1)(a) of the *NDA* to be of no force or effect in its application to any civil offence for which the maximum sentence is five years or more. This removed the jurisdiction of the Court on two of the seven offences it was considering as civil offences are those laid under paragraph 130(1)(a) of the *NDA*, namely the first charge for sexual assault contrary to section 271 of the *Criminal Code* and the third charge of voyeurism contrary to section 162(1) of the *Criminal Code*. Those charges involved one complainant who testified at trial on these offences which allegedly occurred in Victoria, British Columbia. The jurisdiction over another charge of voyeurism remains as the offence was allegedly committed in the United States and is therefore properly considered a service offence even if the CMAC *Beaudry* decision considers the same offence committed in Canada as a civil offence.

[5] As soon as the Court was made aware of the CMAC *Beaudry* decision, it sent a note to counsel soliciting advice as to the impact of the decision and the way forward. The court was reopened in the afternoon of 19 September 2018 but counsel were unable to advise on the next step. The prosecution needed time to communicate with its chain of command. The Court reopened again on 20 September 2018. The prosecution advised that the CMAC *Beaudry* decision would be appealed to the Supreme Court of

Canada (SCC) and that the prosecution was going to seek a stay of its effects as soon as possible. However, no timeline was available. A two-week period was requested to be able to obtain and communicate more details. The Court reopened by videoconference from Gatineau, Quebec, on 4 October 2018 and was informed that documentation had been filed at the SCC for a stay application and that a date for that hearing had yet to be set. The prosecution's position was that no findings should be made until the SCC had, at least, spoken on the suspension. The defence stressed the fact that the *Jordan* deadline would be 10 November 2018. An agreement was reached to reconvene by videoconference on 23 October 2018. However, as that date approached, parties communicated with the Court by email that there was no update to be given as no additional details were available as to the date the SCC may hear the stay application. It was understood that no further communications between counsel and the Court were necessary until the stay application had been heard.

[6] The stay application was heard at the SCC on 14 January 2019. It was dismissed from the bench, the prosecution having failed, in the Court's view, to establish that the balance of convenience favoured granting the stay sought. By that time, the hearing of the *Beaudry* appeal itself had been set for 26 March 2019.

[7] On 8 February 2019, counsel for the defence requested a teleconference to discuss the way forward. This teleconference occurred on 18 February 2019. The defence stated that the accused was demanding that findings be made. The prosecution replied that it would be premature to render findings until the SCC has heard and ruled on the *Beaudry* appeal. The defence replied that it would file an application for excessive delay. Dates were then canvassed with counsel and the week of 27 May 2019 was reserved for a hearing at Canadian Forces Base Esquimalt to hear the delay application and any other matter as necessary given that by then the SCC may have rendered its decision in *Beaudry*. A follow-up teleconference took place on 28 March 2019, following the hearing at the SCC, and a schedule was then set for filing material on the delay application. By then, a new prosecutor had been assigned to the case.

[8] To this day, there is no indication when the SCC may render its decision on the *Beaudry* matter and, of course, no indication of what that decision might be.

[9] This summary of the circumstances of the case is taken from the record before the Court. The parties did not request that any other evidence be adduced or considered for the purpose of this application.

Analysis

The Jordan framework

[10] In *R. v. Jordan,* 2016 SCC 27, the SCC has mandated a new analytical framework for applying section11 (*b*) of the *Charter* to move from a culture of complacency regarding timely justice to a culture of accountability. This analytical framework is applicable to litigants in the military justice system and a presumptive

ceiling of 18 months has been set and subsequently followed by courts martial respectively in *R. v. Thiele*, 2016 CM 4015 and *R. v. Cubias-Gonzales*, 2017 CM 3003.

[11] The first step under the framework entails calculating the total delay from the charge to the actual or anticipated end of the trial. In this case, the delay is 24 months. It is increasing every day as the full completion of this trial with findings on all charges depends on the timing of the SCC's decision in the *Beaudry* matter.

[12] The second step of the framework requires subtracting any period of delay attributable to the defence. For the purpose of this application, the parties took the position that there is no delay attributable to the defence in this case.

[13] The third and most important step is then to determine if the net delay falls below or over the ceiling beyond which the delay is presumptively unreasonable. That is where the parties' position in this application differ.

Position of the parties

[14] The defence is of the view that the 19 September 2018 CMAC *Beaudry* decision did not stop the clock. The approximately eight-month delay, which continues to accumulate, therefore counts as part of the total delay for the *Jordan* analysis and the ceiling has been breached. The delay is presumptively unreasonable and the prosecution has failed to rebut this presumption.

[15] For its part, the prosecution submits that the period since 19 September 2018 onward should be associated with delay caused by the pursuit of an extraordinary remedy such as a writ of *certiorari*. Consequently, that period should not be counted in the total delay. Alternatively, the prosecution submits that the delay since 19 September 2018 constitutes a discrete event constituting an exceptional circumstance outside of its control, which should be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. In either way, the *Jordan* time period would remain at 16 months and 9 days, hence below the threshold. As the defence has failed to show that the delay was unreasonable, a stay cannot be granted.

The "exceptional circumstance of a discrete event of an extraordinary remedy" argument by the prosecution

[16] At the outset, I must state that I have not been convinced by the argument of the prosecution which invites me to merge the period of delay since 19 September 2018 in this case with periods of time spent pursuing extraordinary remedies such as *certiorari* in the course of criminal trials. The two decisions of the Ontario Court of Appeal in *R. v. Manasseri*, 2016 ONCA 703 and *R. v. Tsega*, 2019 ONCA 111 brought to my attention by the prosecution are inspiring in the analysis of exceptional circumstances, but deal with extraordinary remedies initiated by the Crown, a totally different situation than in the case at bar. The situation in this case occurs entirely outside of the trial context and is not related to the accused in any way, contrary to legal proceedings or

appeals involving persons associated with a given accused in the course of the perpetration of an alleged offence as is the case with *Manasseri* and *Tsega*. The alternative argument of the prosecution is more convincing and I will therefore focus my efforts on the issue of exceptional circumstances.

Exceptional circumstances in the Jordan analysis

[17] In prescribing the analysis to be performed by an application judge adjudicating a section 11(*b*) application, *Jordan* accepts at paragraph 69 that exceptional circumstances may need to be considered to subtract a given period of delay. Such exceptional events need first to be reasonably unforeseen or reasonably unavoidable and, second, need to be events which cannot be reasonably remedied by Crown counsel as they arise. The determination of whether circumstances are exceptional will depend on the application judge's good sense and experience. The list is not exhaustive but in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases as described at paragraph 71 of *Jordan*.

[18] In my view, the former category of discrete events is applicable here. Any period of delay caused by any discrete event must be subtracted from the net delay to determine whether the delay falls above or below the presumptive ceiling.

[19] As for the reasonably unforeseen or reasonably unavoidable requirement, it cannot be convincingly argued, in my view, that the loss of jurisdiction of this Court over two of the most important offences on the charge sheet as a result of the CMAC *Beaudry* decision was foreseeable. The fact that a panel of the CMAC was deliberating since January 2018 on the constitutionality of section 130(1)(a) of the *NDA* for a third time in almost three years was known, but the worst possible outcome from a loss of jurisdiction point of view was a decision in line with *R. v. Déry et al.*, 2017 CMAC 2 where a judge of the court expressed disagreement with, but recognized that the CMAC's decision in *R. v. Royes*, 2016 CMAC 1 was a binding precedent. That is especially true given that the SCC had already agreed to hear the issue by granting leave to appeal in the *Déry* matter, subsequently renamed to be known as the *Stillman* case. It is not an exaggeration to state that the outcome of the CMAC *Beaudry* decision stunned the military legal community.

[20] It would appear therefore that the CMAC decision in *Beaudry* was a situation that could correspond to an exceptional circumstance that lies outside the Crown's control as foreseen at paragraph 69 of *Jordan*. As recognized by Watt J.A. of the Ontario Court of Appeal in *Manasseri*, discrete events that delay completion of trial proceedings may arise outside the trial context. That is the case here.

[21] That said, discrete events must lie outside the Crown's control. As foreseen by *Jordan, Tsega* and *Manasseri*, to be considered as such, an exceptional circumstance must not only be reasonably unforeseen or unavoidable, but also are such that it cannot be reasonably remedied by Crown counsel. As stated in *Manasseri*, "[T]he Crown and the justice system must always be prepared to mitigate the delay resulting from discrete

exceptional circumstances. Reasonable efforts to prioritize a faultering or stumbling proceedings must be undertaken. Thus, any part of the delay that the Crown and system could reasonably have mitigated may not be subtracted."

The key issue: action or inaction of the prosecution since 19 September 2018

[22] In light of the arguments of both parties, in writing and during oral argument, I conclude that the key issue in this application is whether the prosecution's choice to wait for the outcome of the *Beaudry* appeal at the SCC is responsible and respectful of the accused's right to be tried within a reasonable time. It would be the case if no other reasonable course of action would be expected to mitigate the delay.

[23] The prosecution alleges that its choice of action is adequate, but in the same breath argues that it is not for the application judge to enter into an evaluation of the reasons for the prosecution's actions and second-guess the prosecution's decision. Referring to the reasons of Hourigan J.A. at paragraph 82 of *Tsega*, the prosecution argues that the application judge must recognize the Crown's discretion to take (or not take) steps in mitigating the delay and limit the analysis to a consideration of whether the Crown's actions were frivolous, undertaken in bad faith or executed in a dilatory manner. If it is not the case, then the application judge should recognize that the circumstance could not be mitigated.

[24] For its part, the defence alleges that the prosecution was bound to do something, namely to transfer the case to civilian authorities. The prosecution should have done that at the latest when it became clear that the effects of the CMAC *Beaudry* decision could not be suspended, on 14 January 2019. Instead, it has done nothing. The defence argues that the four months which have passed, at least since that date, bring the delay over the presumptive ceiling and should lead to a stay of proceedings being granted.

The prosecution's inaction since 19 September 2018 is reasonable in the circumstances

[25] Without settling the potential issue of the standard of review of the Crown or prosecution's decisions in cases such as this one, I do believe that the actions of the prosecution in waiting for a settlement of the jurisdictional debate by the SCC to be adequate in the circumstances of this case. The evidence in this case has been heard and the Court is in a position to render findings on all charges in all likelihood shortly after the SCC, the last level of appeal in this case, renders its decision. Based on a 10-year trend of average time between a hearing and a judgment found in the recent SCC publication "2018 Year in Review", it would take an average of 5.79 months to obtain the decision in the SCC *Beaudry* matter. That means it would be reasonable to hope that a decision might be rendered by the end of September 2019 unless, of course, the SCC *Beaudry* case falls on the wrong side of the average.

[26] I believe the defence oversimplifies matters when it argues that the prosecution should have simply "traverse the matter to civilian authorities" and failed to mitigate

delay in refusing to do so. Indeed, a number of complicating factors come to mind in dealing with such a proposition. First, the prosecution would arguably have to move to take the matter out of this Court's hands, as it is closed to deliberate and consider findings, entitling parties to a disposition as provided for at article 112.40 of the *Queen's Regulations and Orders for the Canadian Forces*. There is no mechanism to do so in regulations, a situation which does not constitute an absolute bar but would demand thoughtful consideration on a number of issues, requiring time and involvement of the defence.

[27] Secondly, military prosecutors do not have the capacity to simply proceed in civilian courts. The Court has not been informed of the process applicable in every province, especially British Columbia where this trial takes place, but an information would have to be sworn, investigators and prosecutors engaged before the matter would be ready to a trial. This process normally takes a number of months, as explained in cases such as *R. v. Morin*, [1992] 1 SCR 771 in the paragraphs dealing with institutional delay. It is far from obvious that choosing this option would ensure a trial by end September 2019. This is not to mention other difficulties for all parties including witnesses who would have to go through the effort of testifying again in a trial *de novo* and difficulties for the accused who would have to retain a lawyer at his own expense. These efforts are certainly required every time a court of appeal orders a new trial on appeal and in that way are part of the necessary working of a fair justice system. However in this case, such difficult steps may turn out not to be unnecessary. Should the SCC render a decision favourable to the prosecution in the *Beaudry* matter, one can imagine the difficulties faced by a prosecutor in trying to explain why a decision was made to divest the court seized of the matter in favour of another authority which may take months before arriving at the same stage.

[28] To be clear, the Court is also under an obligation as the embodiment of the justice system to mitigate the delay resulting from any discrete exceptional circumstances. As the judge seized with this matter, I do believe that the preferable course of action in this case is to wait for the outcome of the *Beaudry* decision at the SCC. Once that decision is rendered, I, and all other parties, will be in a position to fulfil my duty to ensure that these proceedings continue and arrive at a conclusion in a period of time which meets *Charter* requirements protecting the right to be tried within a reasonable time. Should there be a failure to ensure that it be done, Corporal McGregor will be free to file another application on the basis of new facts.

[29] In closing, I wish to reiterate that I am not insensitive to the plight of Corporal McGregor who awaits the conclusion of proceedings undertaken against him over two years ago. I suspect that those who testified in this case are also very much interested in knowing the result of my deliberations. Indeed, as I walked into the courtroom in the afternoon of 19 September 2018 to seek the advice of counsel on the way forward following the CMAC decision in *Beaudry*, I could see the disappointment in the expression of the accused and complainants alike at being deprived of findings in the context of a long trial and difficult testimony. I am convinced, however, that waiting for

the final word on jurisdictional issues by our SCC is the best way to ensure that justice be done as quickly as the extraordinary circumstances of this case require.

FOR THESE REASONS, THE COURT:

[30] **DISMISSES** the application for a stay of proceedings.

Counsel:

Mr D. Hodson, Defence Counsel Services, Counsel for the Applicant, Corporal C.R. McGregor

The Director of Military Prosecutions as represented by Commander S. Torani, Counsel for the Respondent