Citation: *R. v. ex-Corporal T.D. Rioux*, 2007 CM 2011

Docket: 200650

DISCIPLINARY COURT MARTIAL
CANADA
NOVA SCOTIA
HALIFAX

Date: 1 August 2007

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

HER MAJESTY THE QUEEN
v.
EX-CORPORAL T.D. RIOUX
(Accused)

DECISION RESPECTING A PLEA IN BAR OF TRIAL UNDER QUEEN'S REGULATIONS AND ORDERS 112.05(5)(b) IN RESPECT OF 11(b) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered orally)

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[1] I find, principally because of the quality of the argument, that I am in a position to render a ruling now. Although the regulation dealing with pleas in bar of trial appears to require me to close the court for that purpose, I do not feel that that is necessary, but, if it is, we will consider the court closed and reopened now.

[2] There will be a stay of proceedings on both charges before the court. Since there remain no other charges before the court, the panel for this Disciplinary Court Martial is discharged. I expect to deliver reasons for this ruling after a short adjournment until 1145 hours this morning. Officer of the Court, please advise the members of the panel that they have been discharged from their duties to this court, and advise them that they are at liberty to leave or to attend this court, when court resumes at 1145.

[3] The accused, former Corporal Rioux, is charged with two offences under the *National Defence Act*, a charge of assault, contrary to the *Criminal Code*, which is a service offence under section 130 of the *National Defence Act*, and an alternative charge of using violence against a superior, contrary to section 84, all said to have occurred on 15 April 2005.

[4] At the opening of her trial by Disciplinary Court Martial on 31 July 2007, and prior to plea, by counsel, the accused raises a plea in bar of trial under Queen's Regulations and Orders 112.05 (5)(b), claiming that her right to trial within a reasonable time has been infringed or denied, and seeking a stay of proceedings. Section 11(b) of the *Canadian Charter of Rights and Freedoms* provides that:

> Any person charged with an offence has the right
> ...
> (*b*) to be tried within a reasonable time;

[5] The accused was charged with the offences in a Record of Disciplinary Proceedings dated 19 August 2005, and apparently served upon the accused the same date. Counsel before me are agreed that the time period for consideration is, therefore, a period of slightly more than twenty three and one-half months before the matter came to trial.

[6] In the case of *Bombardier Wolfe*, in a ruling delivered in Gagetown on 24 August 2005, I stated, and I quote:

> 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 asa a whole has an important interest in seeing that criminal prosecutions are dealt with without undue and unreasonable delay.
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> ... 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 [by] 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 the 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.
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> And at paragraph 30 ...
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> > 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."

Carrying on with my quote in *Wolfe*:

> 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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> 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 ... are:
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> 1. The length of the delay from the time the 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;
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> 3. Limits on institutional resources; and
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> 4. Any other reasons for delay.
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> 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.
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> 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.
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> 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.*

[7] Counsel for the prosecution concedes that the time period involved in this case, on its face, requires an examination of the remaining issues, and further concedes that no part of the delay to trial was waived by the accused.

[8] In my view, the chief reasons for delay in the present case are the accommodating of the scheduling of defence counsel and the unavailability of sufficient judges during the period. A period of seven and one-half months elapsed between the preferral of the charges to court martial on 20 March 2006 and early November of 2006, when a judge became available to hear the trial.

[9] In the case of Major Brause, decided in London, 18 May 2007, I drew the following conclusions on the evidence before me in that case. The same body of evidence is before me in the present case. I stated as follows:

> There is a body of documentary evidence before me on this application concerning a severe shortage of judicial resources available to hear cases at court martial for substantial periods of time. Indeed, for the time period of August 2005, shortly following the laying of charges in this case, until June of 2006, except for a few weeks in December of 2005, all the available judicial resources were devoted to presiding in court, or to training, or on leave, or dealing with illness, or committed to office administrative duties. During this time period, and for some time well prior to this period, the chief military judge wrote to both the Minister of National Defence and to the Judge Advocate General, pointing out the need for a fourth military judge to be appointed.
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> ... By April of 2006, the month following the preferral of charges in the present case, there was a backlog of 36 cases preferred for court martial, but without a military judge assigned to hear the case, because the only two available judges were fully booked until mid-July of 2006.
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> It is abundantly clear, on the evidence I have heard, that the Minister and his officials must have been aware of the existence of a large backlog of cases preferred for court martial that would inevitably create long delays before the cases could reach the trial stage. The present case was one such case.
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> There is no evidence before me as to the response the chief military judge may have received to her repeated requests for additional judicial resources, or, if such a response was made, what the reasons may have been for failing to provide more judges. Whatever

> the reason, it is clear that the trial of the present case has been delayed for many months, in large part because of the unavailability of sufficient judicial resources to deal with the cases preferred for court martial.

[10] I find the same conclusions apply in the case of ex-Corporal Rioux. This case also was caught in the backlog that resulted in delay of over seven months. The prosecutor concedes that the lack of sufficient institutional resources counts against the prosecution. I agree, and I repeat what I stated in the case of *Major Brause*:

> ... The insufficiency of resources devoted by the executive arm of government to the discharge of judicial business, whether it be from a lack of physical facilities, trained support personnel, or judges, must, at some point, be laid at the account of the prosecution. It is true that the resources that can be devoted to the court system are not unlimited and must compete with many other worthy claims upon public funds. But as Sopinka J. stated, in *R. v. Morin*:
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> > ... The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources....

[11] Continuing with what I said in Brause:

> In my view, that point in time has been reached in this case, where the time taken to reach the trial exceeds, by a factor of five, the inherent time requirements to deal with a non-complex case at court martial, of which Justice Letourneau spoke in [the case of] *R. v. Lachance* [in the Court Martial Appeal Court.]
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> I accept the submission of counsel for the applicant that the responsibility rests with the prosecution authorities to bring the accused to trial within a reasonable time. In this respect, I adopt and apply, to the present case, the observation of the Ontario Court of Appeal in *R. v. Satkunananthan,* (2001) 152 C.C.C. (3d) 321, at paragraph 46:
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> > ... This case illustrates, as Sopinka J. stated in *R. v. Smith* ... [T]hat there may be circumstances in the course of a criminal proceeding where it is incumbent upon the Crown to select, or arrange for, a hearing date more commensurate with the right of

> an accused person to be tried within a reasonable time. Indeed ...
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> and I emphasize,
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> *... [T]he longer the proceeding is in the system, the greater the responsibility of the Crown to expedite the hearing date to get the case on for trial.*

[12] In the present case, counsel for the prosecution points out that the trial date in this case was set with the concurrence of defence counsel. The prosecution was ready to proceed to trial many months earlier, but was content to set trial time convenient to the defence when defence counsel advised that, in his view, there was no urgency in setting trial time because the accused was not in jail pending the trial, and she had been released from the Canadian Forces. This intimation was made in December of 2006, at a time when judicial resources had become available, but still some sixteen months after the charges were first laid.

[13] Defence counsel advises that, at the time of this intimation, he was unaware of the health circumstances of his client, that he now argues are exacerbated by the delay in setting trial time. The prosecution submits, that in setting trial time, they were entitled to rely upon the representation of the defence that there was no urgency involved in setting trial time. Cases such as *R. v. Barkman,* from the Manitoba Court of Appeal, are cited in support of the proposition that the defence can hardly complain of delay to trial when the trial time is set to accommodate the busy schedule of defence counsel.

[14] In my view, this argument has but little application to proceedings at court martial. The *National Defence Act* provides, at section 162, that:

> Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit....

This statutory provision distinguishes proceedings at court martial from criminal charges before the civilian courts. As I stated in the case of *ex-Corporal Chisholm*:

> The unnecessary lapse of time between the commission of an offence and punishment following a trial diminishes the disciplinary effect that can be achieved only by the prompt disposition of charges. This distinguishes the system of military justice from the civilian criminal justice system where there is no disciplinary objective, nor is there any statutory obligation on any of the actors to proceed promptly at all stages of a prosecution.

In my view, this clear statutory obligation reinforced the obligation upon the prosecution to bring the accused to trial promptly, whether the defence was content with the slow pace of proceedings or not.

[15] With respect to prejudice, I am persuaded by the evidence and argument in this case that the accused, ex-Corporal Rioux, has suffered actual prejudice, as that term is understood in our law, by reason of the delays to trial. I accept the evidence that she suffered from Post-Traumatic Stress Disorder at the time of the events giving rise to the charges, and that her course of treatment and prospects for recovery were adversely affected, to some degree, by the length of time it has taken to bring the case to trial. I also find that this is a proper case in which to draw the inference of prejudice to the security interests of the accused as a result, solely, of the extraordinary delays to trial.

[16] The accused seeks, by way of remedy, that the proceedings be stayed. A stay of proceedings is simply a determination that the case will not proceed to a finding of guilty or not guilty. I accept the submission of the prosecution that there is a large and important public interest in proceeding with the trial of this case to a finding of guilty or not guilty. While a charge of common assault is not the most serious charge in the *Criminal Code*, the conduct charged against the accused is, in my view, much more serious in a military context. But it is the disciplinary aspect of these charges that distinguishes them from an ordinary assault under the *Criminal Code.* As I have stated, the disciplinary effect to be achieved by prompt prosecution, adjudication, and sentence is substantially reduced, and perhaps eliminated altogether, by the lengthy delay in this case.

[17] I must balance those considerations against the delay involved in this case, and the effect of that delay on the interests protected by section 11(b). In my view, the balance of interests in this particular case weighs in favour of the applicant, and accordingly, I ordered a stay of proceedings on both charges. The proceedings of this court martial in respect of ex-Corporal Rioux are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

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