Citation: *R. v. Major M.W. Brause,*2007 CM 2007

Docket: 200656

STANDING COURT MARTIAL
CANADA
ONTARIO
HMCS PREVOST

Date: 18 May 2007

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

HER MAJESTY THE QUEEN
v.
MAJOR M.W. BRAUSE
(Accused)

DECISION RESPECTING AN ALLEGED VIOLATION OF SECTIONS 7 AND 11(b) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered orally)

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[1] At his trial by Standing Court Martial, on four charges under the *National Defence Act*, in charge 1, wastefully expending public property, in charges 2 and 3, an act of a fraudulent nature, and in charge 4, disobeying a lawful command, Major Brause applies, by written notice of application prior to plea, for a stay of proceedings based upon what are said to be violations of the rights guaranteed by sections 7 and 11(b) of the *Canadian Charter of Rights and Freedoms*, to be tried within a reasonable time. For the reasons that follow, the application succeeds, and the court orders a stay of proceedings on all four charges.

[2] The evidence on the application consisted of the testimony of the applicant, his treating psychiatrist, Dr Richardson, and the investigator from the National Investigation Service, former Captain Lampron. As well, the applicant introduced a number of documents, including an Agreed Statement of Facts that sets out, in chronological order, many of the relevant events during the investigation and following the laying of charges.

[3] The prosecution called further evidence from Mr Lampron, as well as the evidence of Lieutenant-Colonel Zuwerkalow who was the applicant's commanding

officer and the person who initially received complaints from the applicant's junior officers and who initiated the NIS investigation.

[4] It appears that the complaints leading to the investigation first surfaced in December of 2003. A lengthy NIS investigation ensued and, on 11 July 2005, the four charges now before the court were formally laid. The charges were referred to the Director of Military Prosecutions on 7 September 2005, and after a lengthy review by that office a charge sheet, Exhibit 2 before me, was signed on 30 March 2006, and preferred on 10 April 2006 by filing with the Court Martial Administrator. Eventually, a trial date of 15 May 2007 was agreed by the parties, and a convening order was issued accordingly. Thus the time the charges were laid on 11 July 2005, until the trial, is a period of some 22 months.

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

> The *Canadian Charter of Rights and Freedoms* provides in section 11(b):
>
> 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 unreason able 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 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 pretrial 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 ... quote:
> >
> > 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 and accused's "fair trial interest."

Carrying on with my quote from *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.
>
> 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 principle 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 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.
>
> 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.
>
> 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.
>
> 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.*

[6] The parties are agreed that the period to be examined for purposes of the right to a trial within a reasonable time is the period of some 22 months from the time charges were laid, on 11 July 2005, until the trial, which commenced 15 May 2007. The prosecution concedes that this period of delay is sufficiently long to require the court to examine the remaining factors identified by the Supreme Court of Canada in the cases of *R. v. Morin* and *R. v. Askov*, to determine the reasonableness of the delay.

[7] The period of delay to be examined is reduced by the length of any period that the applicant may be said to have waived. The applicant submits that there was no waiver of any of the time period involved in bringing the case to trial. The prosecution, on the other hand, contends that there was a waiver by the applicant of his right to a trial within a reasonable time. In this connection, the prosecutor points to the evidence of the applicant that he was not interested in proceeding to trial immediately after the charges were laid in July of 2005, until sometime in September of 2005. .

[8] As well, the prosecutor points to a statement made by the applicant in a lengthy email dated 18 September 2006, addressed to Lieutenant-Colonel Trollop, on the subject of an assisting officer to help the applicant with a possible redress of grievance. In the course of the message the applicant requests that if there is to be a trial, that it be postponed until a grievance that he has in contemplation at the time is dealt with by the chain of command.

[9] The standard for establishing the waiver of a *Charter* guaranteed right, including the right to trial within a reasonable time, is a demanding one. As Sopinka J. stated for the majority of the Supreme Court of Canada in *R. v. Morin,* and I quote:

> This Court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights....

[10] Applying this standard, I cannot conclude that the applicant has waived any of the time periods involved. Although the applicant knew, at the time of the email statement, that the charges were preferred for court martial, no trial date had been set, nor did there appear to be much prospect that a date would be set in the near future. The addressee of the email, on the evidence I have heard, had nothing to do with the prosecution, and no role to play in the timing of the trial. There is nothing to indicate that the applicant was even adverting, at all, to his right to trial within a reasonable time, much less that he was foregoing the constitutional protection with knowledge of the right and of the effect of waiving the right. Nor do I find that the applicant waived the two-month period from July to September of 2005. On the evidence of his mental state at the time, it is clear that he was merely unable to deal with the materials that had been made available to him by the disclosure process. I find there has been no waiver of any time periods.

[11] As for the reasons for delay, I consider, first of all, the inherent time requirements of the case. I do not accept the submission of the prosecution that this case is unusually complex. It is true that the investigation was lengthy, but that appears to have been because the investigation was very much more extensive than the matters which have resulted in the four charges. The charges themselves, while serious, do not appear to be unusually complex or to have required more than the usual preparation time for trial.

[12] In my view, the "intake requirements" referred to by Sopinka J. in *R. v. Morin,* have little application to the processes at court martial. I note, however, that the Court Martial Appeal Court, speaking through Mr Justice Letourneau in *R. v. Lachance*, 2002 CMAJ No. 7, observed that for two simple charges necessitating only a short period of time for preparation by counsel:

> ... [T]he normal period for trying such charges is four months.

[13] The principle reasons for delay in the present case are the actions of counsel and the limitations on institutional resources occasioned by a shortage of military judges available to hear cases during the period under review. Counsel for the applicant conceded that the defence was responsible for some two months of the delay to trial because of the unavailability of a defence witness on a proposed trial date of the week of 20 March 2007. The May dates were, apparently, the next available convenient dates for trial.

[14] Prosecution counsel were in possession of the file for purposes of post-charge screening for a total of about six and one-half months, from the time of the referral from the chain of command in mid-September of 2005, until the charge sheet was signed 28 March 2006. During this time period, two prosecutors worked on the screening, but neither of them accomplished the screening within the period of 60 days that, I am told, is the policy of the Director of Military Prosecutions. There was no evidence led in this case to demonstrate why the screening process could not be accomplished within the usual period contemplated by the policy. As well, a proposed date for trial of 30 January 2007 did not materialize because the prosecutor was assigned to another case that was already underway.

[15] 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.

[16] The situation became acute when, in December of 2005, the chief military judge became ill and advised the Minister, in writing, that she was medically unable to hear cases for a period of months. 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.

[17] 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.

[18] 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.

[19] The prosecutor disavows responsibility for the delays occasioned by the lack of sufficient judicial resources. He points out that two days after the preferral of the charges to court martial, the court martial administrator advised both counsel that there was "no judicial availability at that time," and invited counsel to keep her advised of the availability of counsel. Then, in mid-November of 2006, the CMA advised both counsel that a judge was available to hear the case in early January of 2007. It is suggested that there was no point in seeking trial time until the CMA advised that a judge was available. The prosecutor argues, therefore, that the time period from preferral of the charges, in April of 2006, until the communication from the CMA, in November of 2006, should be considered as neutral time in the calculation of the period of delay.

[20] I cannot accept this submission. 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*:

> ... 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....

[21] 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 *R. v. Lachance.*

[22] 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:

> ... This case illustrates, as Sopinka J. stated in *R. v. Smith,* [1989] 2 S.C.R. 1120 at 1135, 52 C.C.C. (3d) 97, that 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 ...

and I emphasize,

> *... [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*. [Emphasis added.]

[23] In my view, the evidence in this case discloses that the prosecution authorities were apparently content to leave the scheduling of the trial to the Court Martial Administrator, and there is no evidence that any steps were taken, once judicial resources became available, to expedite the trial of charges that had already been in the system for a considerable period.

[24] The last factor the court must consider in this analysis is prejudice caused to the applicant by the delays to trial. The applicant himself gave evidence on this point. I have approached his evidence with some care and caution as I found many of his answers, both in examination-in-chief and in cross-examination, to be rambling and unresponsive to the questions put to him. I have considered, in the assessment of his evidence, the mental state of the applicant as described in detail by Dr Richardson, whose evidence I accept fully and without hesitation.

[25] I am persuaded, principally by the evidence of Dr Richardson, that the applicant suffered Post-Traumatic Stress Disorder, together with severe depression, as a result of his experiences on deployments in Bosnia in 1994, and the Iraq/Kuwait border in 2000. More significantly, I am persuaded that the time it has taken to reach trial in this case has adversely affected the applicant's mental health and his prospects for an improvement in his mental health. There is, therefore, some actual prejudice for

purposes of the section 11(b) analysis. Even in the absence of evidence of actual prejudice, I would find that the length of delay in this particular case is such as to justify an inference of prejudice to the security interests of the applicant.

[26] In the case of *Bombardier Wolfe*, I stated, and I quote:

> ... In speaking of the right to trial within a reasonable time, Sopinka J. for a majority of the Supreme Court of Canada wrote in the case of *R. v. Morin* ... quote:
>
> > The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay....

[27] In the present case, as in the case of *Bombardier Wolfe*, the applicant seeks a stay of proceedings as a remedy under section 24(1) of the *Charter,* for the infringement of the right to trial within a reasonable time. Subsection 24 reads:

> 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.

[28] A stay of proceedings is a judicial pronouncement that a prosecution will not proceed to a finding of guilt or innocence.

[29] In the case of *R. v. Morin,* McLachlin J., as she then was, stated as follows:

> It is easy, in considering the factors which can bear on that determination to lose sight of the true issue at stake—the determination of where the line should be drawn between conflicting interests. On the one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct. It is an understatement to say that this is a fundamental and important interest. Even the earliest and most primitive of societies insisted that the law bring to justice those accused of crimes. When those charged with criminal conduct are not called to account before the law, the administration of justice suffers. Victims conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.
>
> On the other side of the balance stands the right of a person charged with an offence to be tried within a reasonable time. When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty or security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice.

> The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.

[30] I agree with the submission of the prosecution that there is a large and important public interest in the resolution of the charges against Major Brause by trial, and a finding of guilty or not guilty. Parenthetically, it may also be said that the accused himself has an interest in a judicial finding of innocence. But my task is to weigh those interests in light of the factors I have referred to above. In my view, in this case, the balance favours the applicant.

[31] As a result of this holding, I find it is not necessary to deal with the applicant's alternative submission under section 7 of the *Charter*. There will be a stay of proceedings on all four charges.

[32] Officer of the Court, you may return Major Brause's headdress to him. Major Brause, you may withdraw. The proceedings of this court martial in respect of Major Brause are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

COUNSEL:

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