Citation: *R. v. Corporal T.M. Khadr,* 2007 CM 2025

Docket: 200707

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA

Date: 20 September 2007

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

HER MAJESTY THE QUEEN
v.
CORPORAL T.M. KHADR
(Accused)

Decision re: Section 11(b) *Charter* application -
(Right to be Tried Within Reasonable Time)
(Rendered orally)

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[1] Please be seated. Counsel, I'm prepared to make a ruling with respect to the application under section 11(*b*). I'm indebted to both counsel, Major Duncan for the defence and Major Tamburro for the prosecution, for the thoroughness with which this application was argued.

[2] At his trial by Standing Court Martial on two charges under the *National Defence Act*, the accused, whom I will refer to as the applicant, applied, at the outset of the trial and prior to plea, for a stay of proceedings based upon what is said to be a violation of his right to be tried within a reasonable time, guaranteed by section 11(*b*) of the *Canadian Charter of Rights and Freedoms*. For the reasons that follow, the application is dismissed.

[3] The evidence disclosed that on 1 August 2006, the applicant was brought before his company commander, Major Scott, for the summary trial of two charges, one of insubordinate behaviour, contrary to section 85, and a charge of absence without leave, contrary to section 90 of the *National Defence Act*.

[4] The charges before me allege behaviour with contempt toward a superior officer in the first charge, and a second charge of causing a disturbance in the proceedings of a person presiding at a summary trial, and allegedly arise out of the conduct of the applicant at or around the time of the summary trial before Major Scott.

[5] The salient events leading up to this trial are contained in an agreed statement of facts that was exhibited before me as Exhibit M2-2. It discloses that the applicant was charged with the two offences before me when a Record of Disciplinary Proceedings was raised and signed on 15 August 2006. By that time, Major Scott had become the acting commanding officer of the applicant's unit, 1 RCR Rear Party. He referred the charges to the Commanding Officer of the 3rd Battalion, RCR.

[6] I find that he did so because he felt he was closely involved with the case as a witness and this precluded him from trying the case summarily. But on 25 August 2006, the applicant exercised his right to elect trial by court martial. Accordingly, the CO of the 3rd Battalion referred the case back to Major Scott, who referred the matter for trial by court martial on 29 September 2006.

[7] On 11 October 2006, the applicant was informed that the matter was proceeding to court martial, and was also informed of his right to legal counsel at public expense from the Director of Defence Counsel Services. The applicant indicated his desire to be represented by counsel appointed by the DDCS.

[8] On 24 November 2006, the Director of Military Prosecutions received the application from the referral authority, and the prosecutor, Major Tamburro, was assigned to the case the same day.

[9] Two months later, on 24 January 2007, the prosecutor signed the charge sheet that is before me and forwarded all the disclosure then in his possession to the Director of Defence Counsel Services, Lieutenant-Colonel Dugas. On the same day, the prosecutor preferred the charges to court martial, by letter, to the Court Martial Administrator, CMA, advising that the estimated trial time was one-half day, and that the prosecution was ready to proceed as of 12 February 2007.

[10] On 30 January 2007, the CMA wrote to the prosecutor and the DDCS asking counsel to "consult and inform this office of a mutually agreed trial date that falls within the three-month period," from the date of the letter, in accordance with the policy of the CMA on trial scheduling that is before me as Exhibit M2-5. From that point, it appears that the prosecutor made efforts with the Deputy CMA to try and schedule a trial. These efforts continued through March and April, but were hampered by the fact that the DDCS had not appointed a counsel to act for the applicant, or, if he had, he had not communicated the name to either the prosecutor or to the Deputy CMA.

[11] Thus, on 19 March 2007, the Deputy CMA wrote to the prosecutor by email, indicating that at that date a defence counsel for the applicant had not yet been identified by the DDCS; and this, despite the fact that the charges had been preferred for trial by court martial almost two months earlier.

[12] On 23 April, the Deputy CMA emailed a number of people, including the DDCS, advising that trial time had become available for the week of 7 May 2007, and advising of other trial time available in June, July, and August. There is no evidence before me that the DDCS or anyone from his organization purporting to act as counsel for the applicant replied to either of the communications from the office of the CMA on 30 January or 23 April.

[13] Despite his efforts, the prosecutor received no intimation as to the identity of counsel for the applicant until early May of 2007, when he heard, from some unidentified source, that the DDCS himself, Lieutenant-Colonel Dugas, would represent the applicant. The prosecutor then sent a message to Lieutenant-Colonel Dugas asking him to contact him if he was indeed representing the applicant "in order that we can discuss a trial date." Lieutenant-Colonel Dugas forwarded the message to his assistant and asked her to provide some information. Finally, on 17 May, Lieutenant-Colonel Dugas advised by email to the prosecutor and to the CMA that he was "available on 5 June and 12 June, and after that it will have to be September." This was the first communication by anyone purporting to act as counsel for the applicant as to when counsel was available to conduct the trial, and it occurred almost four months after the preferral of the charges to court martial.

[14] I accept the evidence of the applicant that he was in contact with someone in the office of the DDCS sometime shortly after he was advised, in mid-October of 2006, that the matter was proceeding to court martial. There is no evidence before me to explain the extraordinary delay within the office of the DDCS until counsel on behalf of the applicant was identified to the prosecutor and the office of the CMA.

[15] On 7 June 2007, the prosecutor again emailed the DDCS, advising that there were still a number of cases to schedule, including the case of the applicant, and that he was "yet to hear any suggestions from defence counsel with respect to proposed trial dates," and suggesting a conference telephone call. On the same date, the Deputy CMA emailed the prosecutor and the DDCS stating that "the date of 12 June 2007 was offered, but was turned down by defence counsel due to other commitments." The DDCS then sent a message by email on 8 June to the prosecutor and the Deputy CMA advising that the date was turned down "as it was too late when it was offered (a week) just prior to the beginning of the trial." He went on to say that he was "now available starting the second week of September and October at this time." Thereupon, the Deputy CMA advised by email of 11 June that the trial would be convened for the week of 17 September.

[16] Counsel before me are agreed that the court is to apply the analytical framework set out by the Supreme Court of Canada in *R. v. Morin* to determine whether the *Charter*-guaranteed right to trial within a reasonable time has been breached in this case. Counsel also agree that the period for consideration begins with the laying of the charge on 15 August 2006, to the date of the trial, a period of just over 13 months. Counsel also agree that no part of the 13-month period was waived by the applicant.

[17] In my view it is clear that the principle source of delay in getting this case to trial was the inaction of counsel for the applicant, the Director of Defence Counsel Services. It is obvious, that had defence counsel replied to the enquiries of both the prosecutor and the office of the CMA, that trial time might have been set much sooner than it was when it was finally arranged in the middle of June of 2007, that the trial would proceed in September. To my mind, the failure of defence counsel to reply to these professional communications is unexplained in evidence before me and is entirely unjustifiable.

[18] With respect to the issue of prejudice to the applicant, I agree that the only issue in this application concerns prejudice to the security interests of the applicant. I accept the evidence of the applicant as to how he has felt since the charges were laid in August of 2006. These include stress and anxiety, not only over the charges, but also with respect to the loss of training opportunities and the possibility of a foreign deployment, to which, I accept, the applicant attached great importance. I accept his evidence that he was essentially removed from his unit and required to perform menial tasks at the unit duty centre. As a result, he consulted an psychiatrist and was given a period of sick leave of 30 days.

[19] I also accept his evidence that he expressed his desire for an early trial date to his chain of command. There is no evidence that he communicated this desire to his counsel within the DDCS. If he did, there is certainly no indication that his counsel acted upon that desire. But I accept the submission of the prosecutor that the adverse consequences to the security interests of the applicant are referable to the fact that, as an administrative matter, he was placed on counselling and probation for a period of six months, a few days after the events referred to in the charges, and a few days before the charges were laid.

[20] C and P was imposed, based, in part, on the allegations that form the substance of the charges before me. Once the period of C and P was served, the applicant was returned to his unit for further service as an infanteer, and, indeed, was promoted from private to corporal shortly after completing the period of C and P, and over three months before his counsel was apparently willing to set trial time. I conclude that such prejudice as is shown in this application is not referable to the fact of the charges, themselves, and is certainly not referable to any delay in dealing with the charges. The adverse consequences of which the applicant complains are, rather,

referable to the fact that he was placed on counselling and probation for a number of matters, including the behaviours that are alleged in the charges before me.

[21] It is clear to me that the timing of this trial has been delayed beyond the time period that is inherent in proceedings by court martial under the Code of Service Discipline. When balancing all of the factors I have referred to, I am not satisfied that the right of the applicant to a trial within a reasonable time has been violated in this case. The application is dismissed.

P.J. LAMONT, COMMANDER, M.J.

Counsel:

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Counsel for Her Majesty the Queen
Major G.K. Duncan, Directorate of Defence Counsel Services
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