Citation: *R. v. Corporal J.L. Hentges*, 2007cm2020

Docket: 2006103

STANDING COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE, GATINEAU

Date: 2 November 2007

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

HER MAJESTY THE QUEEN
v.
CORPORAL J.L. HENTGES
(Applicant)

DECISION RELATING TO AN APPLICATION PRESENTED UNDER PARAGRAPH 112.05(5)(*e*) OF THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES IN RELATION TO A VIOLATION OF SECTION 7 (PRE-CHARGE DELAYS) AND 11(*b*)(POST-CHARGE) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

(Rendered orally)

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[1] On 26 June 2007, at the opening of his trial by Standing Court Martial and prior to plea, the accused, whom I shall referred to as the applicant, brought an application under Queen's Regulations and Orders article 112.05(5)(e), seeking a stay of proceedings for what was said to be a breach or infringement of the rights of the applicant under sections 7 and 11(b) of the Canadian Charter of Rights and Freedoms. The application is in writing and was marked Exhibit M2-1.

[2] At the outset, the prosecutor raised an objection to hearing the application based upon what was said to be the insufficiency of the notice provided by counsel for the applicant. On 27 June 2007, I ruled that the application would be permitted to proceed, but that the applicant could not introduce the evidence of two persons, Dr. Heber, a psychiatrist, and Dr. Jordan, a psychologist. I undertook to provide reasons for this ruling. These are those reasons.

[3] The written notice is dated in error 20 June 2006. It is common ground between the parties that the notice was prepared on 20 June 2007, and sent to the office of

the prosecutor, where it was received the next day. Queen's Regulations and Orders article 112.04 entitled, "Requirement for reasonable notice - preliminary applications and objections, " reads as follows:

> (1) Subject to paragraph (3), an application or objection referred to in article ... 112.05 ... may only be made where reasonable notice in writing is given to the military judge assigned to preside at the court martial and to the opposing party.
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> (2) Notice pursuant to paragraph (1) shall include:
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> (*a*) sufficient detail of the nature of the application or objection and of the relief sought to enable the opposing party to respond to it without adjournment;
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> (*b*) the documentary affidavit or other evidence to be used at the hearing of the application; and
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> (*c*) an estimate of the length of time required to present the application or objection.
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> (3) Where notice is not given in accordance with paragraph (1), the judge may permit an application or objection if reasonable cause for the failure to give notice is shown.

[4] In this case, the objection of the prosecutor seems to be related to both the allege insufficiency of detail in the written notice and the short period of time between the giving of the notice and the opening of the trial when the application was brought. In substance, the prosecutor objects that she has not received particulars of the anticipated evidence of two experts: a psychiatrist, Dr. Heber, and a psychologist, Dr. Jordan. The written notice of application refers to the evidence that is proposed to be submitted and refers to the "testimony of three witnesses" without further identification or particulars.

[5] On 21 June, the prosecutor was furnished with a copy of a letter from Dr. Jordan, addressed to defence counsel. The letter is not before me. On 22 June, the prosecutor was advised of the identity of a second expert witness, Dr. Heber, but the defence has not provided the prosecutor with any information as to the qualifications of the proposed witness. The defence has not indicated the areas of the anticipated evidence of these witnesses nor even advised the prosecution of the areas of expertise in which counsel expects to qualify the witnesses for the purpose of opinion evidence.

[6] Defence counsel, Major D'Urbano, argued that the application should be permitted to proceed. In the course of argument, it became apparent that she had been away from her office on leave for some weeks immediately prior to the opening of the trial. When she advised the court that the notice of application was filed by her supervisor, Lieutenant-Colonel Dugas, the Director of Defence Counsel Services, I asked

Lieutenant-Colonel Dugas to appear to deal with the objection based on the sufficiency of notice.

[7] Lieutenant-Colonel Dugas advised the court that he decided to bring this application on or about 20 June 2007. On 13 June, he had sent a message to the prosecutor stating, "because of the PTSD health issue that had an impact on the member, if I was to remain on the file, there would likely be a 7 and 11(b) *Charter* motion." This appears to be the first occasion on which the possibility of the present application was notified to the prosecution. Major D'Urbano was not aware that the application was to be made until the day before the trial was to begin. It seems that virtually no steps had been taken to obtain the written opinions of the experts or provide them to the prosecutor before the trial. Indeed, Lieutenant-Colonel Dugas advised that he did not expect to receive a report from Dr. Heber as the doctor "will testify from the files." Although Major D'Urbano had been in contact with the psychologist some months earlier in relation to other issues, she had had no conversation with Dr. Heber.

[8] Lieutenant-Colonel Dugas advised the court that he took over the file because of the absence of Major D'Urbano and assessed that the present application should be made. At the time of his assessment, it appears that he had very little information as to what the expert witnesses would say, but if he did, he took virtually no steps to bring this information to the attention of the prosecutor.

[9] Significantly, I heard no suggestion from either defence counsel that either of the expert witnesses could give evidence with respect to delay generally or specifically, the effect of delay upon the mental health of the applicant.

[10] Under the *Criminal Code*, section 657.3 requires that the parties to a criminal prosecution give each other advance notice of expert witnesses who will be called at trial. This is to prevent surprise and permit the opposing party time to prepare to deal with the examination of the witness. Often, the other party will need time to consider whether to engage their own expert witness. These things take time and cause delay if one party is taken by surprise by the calling of expert evidence from witnesses who have not previously been notified to the other side with sufficient detail as to what the witness is expected to say, together with the qualifications of the witness to give opinion evidence in an identified area.

[11] There is no equivalent to section 657.3 in the *National Defence Act*, but as I have said on other occasions, the spirit and intent of this provision should be honoured by counsel appearing at court martial for precisely the same reasons that Parliament saw fit to include this provision in the *Criminal Code*.

[12] I reject the apparent suggestion of defence counsel here that the spirit of section 657.3 need not be honoured where it is proposed to call the evidence of experts in pretrial proceedings rather than at the trial itself. The reasons for putting section 657.3 in

the *Criminal Code* are equally strong whether the witness will testify on a trial issue or on a pretrial matter.

[13] In *R. v. Blom*, decided 21 August 2002, Sharp J.A., speaking for the Ontario Court of Appeal, stated in paragraph 23:

> [23] Where a party complains of inadequate notice, it is crucial for the trial judge to consider the issue of prejudice: does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented? If there is no real prejudice, inadequate notice should not prevent consideration of the *Charter* application. If the inadequate notice does put the opposing party at a disadvantage, the court must consider whether something less drastic than refusing to consider the *Charter* argument, but still consistent with the goal of achieving "fairness in administration and the elimination of unjustifiable expense and delay", can be done to alleviate that prejudice. If so, that course should be followed in preference to an order refusing to entertain the *Charter* application.

[14] In my view, the applicant should be permitted to proceed with his application under sections 7 and 11(*b*) of the *Charter*, but I consider that the respondent prosecution on the application cannot reasonably be expected to deal with the evidence of experts on what amounts to no notice at all as a result of the failure of counsel for the applicant to communicate to the prosecutor, at a minimum, a summary of the anticipated evidence of the expert and the qualifications of the witness, in sufficient time for the prosecutor to properly prepare for the examination of the witness. That is what has happened here.

[15] For these reasons, the objection by the prosecutor to proceeding with the application was denied, but the applicant was not permitted to call the evidence of Dr. Jordan or Dr. Heber.

[16] Accordingly, the application proceeded. The evidence on the application consisted of agreed facts between the parties, both in writing and in the course of oral submissions, as well as the testimony of the applicant, Corporal Hentges, the NIS investigator, Master Corporal Thompson, and Sergeant Touchette, the

supervisor of Corporal Hentges during the time period referred to in the charges and apparently up to the present time.

[17] The evidence discloses that Corporal Hentges first came to the attention of the military police 11 August 2004 concerning an allegation of fraudulent use by Corporal Hentges of a DND issued credit card. On 8 September 2004, he was observed by police surveillance using the DND card to fuel his personal vehicle. The following day, the police received further information about questionable meal receipts. Because of the nature of this information, the investigation was given to the National Investigation Service. Master Corporal Thompson was assigned the investigation on 5 October 2004. On 12 October 2004, Corporal Hentges was arrested and interviewed concerning his use of the DND credit card and mileage claims for the use of his personal vehicle. From October of 2004 until January of 2006, Master Corporal Thompson conducted an analysis of hundreds of documents that were obtained in the course of the investigation. He concluded the investigation in May of 2006 and referred the matter to Corporal Hentges' unit for a consideration of disciplinary or administrative action. After the receipt of legal advice in July 2006, Corporal Hentges was charged 11 September 2006 with offences of stealing, fraud and making a false entry in a document.

[18] While the investigation was underway, in February of 2005, the police received further information of possible fraud and forgery offences committed by Corporal Hentges. A second investigation was opened and he was arrested 22 March 2005 for these charges. He did not give a statement to the police. In September of 2005, the police obtained documents by means of a search warrant. The documents were analysed and cross-referenced to the information obtained in the credit card investigation. On 20 October 2005, the police referred the results of the

investigation to counsel for legal advice, which was received by the police on 9 February 2006. The investigation then concluded and on 28 March 2006, Master Corporal Thompson signed a record of disciplinary proceedings charging Corporal Hentges with nine charges.

[19] A third investigation of Corporal Hentges opened on 18 April 2005 concerning a possible fraud in relation to clothing stores. That investigation concluded 25 June 2005, but Corporal Hentges was not charged with two charges until 28 March 2006, the same date as the charges laid in the second investigation.

[20] The charges from the second and third investigation were referred for a court martial and forwarded to the Director of Military Prosecutions. The assigned prosecutor disclosed over 300 pages of material to the defence in July, but it was not received in the office of the Director of Defence Counsel Services until 25 September 2006. The following month, the prosecutor was assigned the first investigation, what I have referred to as the credit card matter. On 7 November 2006, Major D'Urbano was assigned the defence of Corporal Hentges. There followed a course of correspondence between counsel on the issues of disclosure and the setting of trial time. On 27 November, the prosecutor signed a charge sheet containing the 33 charges before the court that apparently arise out of all three police investigations, and preferred the charges to the court martial administrator.

[21] On 13 December 2006, the prosecution disclosed over 800 pages of disclosure relating to the credit card investigation. The defence received this material 4 January 2007. Thereafter, through January, February and March, the prosecutor sought to set trial time in consultation with defence counsel. The defence declined to agree to trial time because of difficulty reaching the client, outstanding requests for

more disclosure and difficulty reaching the client's doctor to determine the doctor's availability for trial. On 20 April, the defence agreed to trial time commencing 26 June 2007 and the court martial administrator convened the court accordingly.

[22] 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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> ...
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> (b) to be tried within a reasonable time;

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

> 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 [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 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, [and I] quote:
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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".

[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".[1]

[13] What is meant by the term "reasonable time" in this context? The Supreme Court of Canada has set out the analytical framework.[2] 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:

1. The length of the delay from the time charges are laid until the conclusion of the trial;

2. Waiver of any periods of time;

3. The reasons for the delay; and

4. Prejudice to the accused.

In its consideration of the reasons for delay, the court must look at:

1. The inherent time requirements of the case;

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

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[1] *R.v. Smith* [1989] 2 S.C.R. 1120 at page 1131 *per* Sopinka J, "It is axiomatic that some delay is inevitable. This question is, at what point does the delay become unreasonable."
[2] *R.v. Morin* [1992] 1 S.C.R. 771 at page 787

reasonableness of the overall delay between the time charges are laid and the conclusion of the trial.[3]

[3] *R.v. MacDougall*, *supra*, para. 41, and see *R. v. Conway* [1989] at 1674 *per* l'Heureux-Dubé J "In deciding a claim made under section 11(b) of the *Charter*, the correct approach in my view is to evaluate the reasonableness of the overall lapse of time. A piecemeal analysis is generally not appropriate. In a case where each individual period, taken in isolation from the others, may constitute a reasonable delay, the total period may nevertheless be unreasonable for the purpose of s. 11(b)."

> [16] These principles have been developed in Canadian civilian courts, but they apply equally to military cases under the Code of Service Discipline contained in the *National Defence Act*.

[23] In this case, the period of time to the opening of the trial on 27 June 2007 is 15 months from the time charges were originally laid on 28 March 2006 in connection with the second and third investigations, and nine and one half months from the time charges were originally laid, 11 September 2006, in connection with the credit card investigation.

[24] Counsel for the applicant submits that in this case, pre-charge delay should also be considered in assessing the right to trial within a reasonable time. Counsel relies upon the decision of the Newfoundland Court of Appeal in *R. v. Finn*, 106 C.C.C. 3(d) 43, upheld by the Supreme Court of Canada at [1997] 1 S.C.R. 10. Counsel submits that in the present case, the right of the applicant to a fair trial and to make full answer in defence has been infringed, and therefore, the time period before the charges were originally laid should be considered in assessing post-charge delay.

[25] In substance, the applicant argues that he suffers from Post Traumatic Stress Disorder as a result of his service in Yugoslavia, and this has adversely affected his memory generally, and specifically, his memory of the time periods referred to in the charges before the court.

[26] In order to appreciate the force of this submission, I reserved the ruling on this application until the conclusion of the evidence on the trial. See *R. v. La*, [1997] 2 S.C.R. 680, and *R. v. Bero*, a decision of the Ontario Court of Appeal dated 3 November 2000. The evidence has now been concluded.

[27] The case was presented by way of a written agreed statement of facts relating to 17 of the 33 charges in the charge sheet. No witnesses were called to testify by either party. The remaining 16 charges were ordered withdrawn at the request of the prosecution and with the consent of the defence.

[28] I accept the evidence of the applicant that he was diagnosed with severe Post Traumatic Stress Disorder and severe depression as a result of terrible experiences while deployed in Yugoslavia. I also accept his evidence that this has adversely affected his memory, but I am unable to find that his ability to make full answer and defence to these charges has been affected by his memory deficit. His formal admission of the facts underlying many of the charges is inconsistent with such a finding. In my view, the fair trial right of the applicant has not been breached by delay in the investigation and referral for prosecution, and therefore, I do not consider the pre-charge period in the assessment of the right to trial within a reasonable time.

[29] The relevant time period is therefore 15 months in the case of some charges, and nine and one half months in respect of the other charges in the charge sheet. It is not suggested that the applicant has waived any of the relevant time periods.

[30] In my view, the delay in bringing the case to trial was largely the result of the actions of counsel for the applicant. Despite repeated requests by the prosecutor to set trial time, defence counsel declined to agree to a date until April of 2007. From the correspondance between counsel, it is clear that defence counsel was unwilling to set trial time for good and valid reasons. Counsel was having difficulty reaching both the client and the medical person and no doubt wished to schedule trial time that was convenient to them. As well, defence counsel was expecting answers

to requests for further disclosure. It is clear that the vast bulk of disclosure was made in a timely manner by the prosecution, and no doubt, it required some time to digest this material and to take instructions. But defence counsel seems on the evidence to have taken the position that trial time would not be set until all outstanding disclosure requests had been answered. There maybe a difference of opinion between counsel as to when the disclosure process was finally completed, but before that time, the defence was apparently unwilling to set trial time.

[31] In my view, the applicant cannot complain of delay in the setting of a trial date when, as in this case, the delay is occasioned by reasonable accommodation of the requests of defence counsel to prepare for a trial in the face of concerted attempts by the prosecution to set as early a trial date as possible. It appears that defence counsel was not prepare to agree to trial time until 20 April 2007. At that time, counsel agreed to the first available date in late June.

[32] I accept the submission of the applicant that the time period involved in bringing this case to trial has caused some prejudice to the applicant, specifically in the effect of the proceedings on the memory of the applicant, and what the applicant referred to has regression in the course of his treatment for PTSD. But on all the evidence, I am not satisfied that the applicant suffered adverse consequences for his military career as a result of delay to trial, nor am I satisfy that a compassionate posting to Toronto was denied to him as a result of delay.

[33] In summary, I am satisfy that there is some prejudice to the applicant by reason of delay. I must measure that prejudice and balance it against the other factors that I have referred to. I conclude that in this particular case, the right of the

applicant to a trial within a reasonable time under section 11(*b*) of the *Charter* has not been infringed or denied.

[34] Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[35] The applicant was arrested on 12 October 2004 in connection with the investigation of misuse of a DND credit card. He apparently gave some information to the police investigators that prompted them to widen their investigation. He was again arrested on 22 March 2005 for offences of forgery, fraud and disobedience of a lawful command. The applicant argues that because he was arrested on two occasions during these lengthy investigations, the authorities were required to proceed with charges as soon as possible following the arrest as a principle of fundamental justice guaranteed by section 7.

[36] Counsel relies on the decision of the Court Martial Appeal Court in *R. v. Larocque,* [2002] CMAC, in support of this proposition. In that case, Létourneau J. stated, at paragraph 17:

> All in all, the provisions of both the Code and the Act, notwithstanding the deficiencies and shortcomings of the latter, identify the following principle of fundamental justice: a person who is arrested without a warrant because the authorities have reasonable grounds to believe he has committed an offence, whether that person is detained or released, shall be charged as soon as materially possible and without unreasonable delay, unless in the exercise of their discretion, the authorities decide not to prosecute .... This principle of fundamental justice is meaningful when, as in the case at bar, the prosecution

> already has, at the time of the arrest, the evidence that would justify the arrest, the charge and the prosecution.

[37] The other two members of the court in *Larocque*, Meyer J. and Goodwin J., do not appear to share the view of Létourneau J. on this point. As well, it is difficult to square with the observation of Laskin, Chief Justice of Canada, for the majority of the Supreme Court of Canada, in the pre-*Charter* case of *Rourke v. The Queen*, [1977] 35 C.C.C. (2d) 129 at page 143:

> The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by courts by fitting investigations into a standard mold or molds.

[38] In any event, the facts of the present case are materially different from those in *Larocque*. That case was a simple case of criminal harassment. The evidence was straight forward and immediately available and there was apparently no need for further police investigation. *Larocque* was kept in custody overnight and released the next day but with restrictions on his freedom. He lost his status as a military policeman and suffered other administrative consequences of an extremely serious nature.

[39] In the present case, the investigator agreed that he had grounds to charge for the incident that the surveillance officers observed on 8 September 2004, but he also had information at the time of the arrest that the accused might have committed other offences of the same nature, and therefore, he pursued the investigation of all the matters rather than charging only the offence allegedly committed on 8 September.

[40] In my view, the police cannot be faulted for releasing the applicant and continuing with their investigation of all the allegations they were receiving. The

investigation of all the allegations was quite complex, resulting in the disclosure to the defence of several hundreds of pages of documentation.

[41] If there is a principle of fundamental justice as expressed by Létourneau J. in *Larocque*, I cannot accept the submission of the applicant that the principle was breached by the actions of the investigative authorities in the present case.

[42] In view of this conclusion that there has not been a breach of section 7, it is unnecessary to decide whether the remedy claimed of a stay of proceedings is just and appropriate in all the circumstances.

[43] For these reasons, the application for a stay of proceedings based upon an infringement of the *Charter* guaranteed rights is dismissed.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major S.A. MacLeod, Military Prosecutions Central
Counsel for Her Majesty the Queen
Major L. D'Urbano, Directorate of Defence Counsel Services
Lieutenant(N) P. Desbiens, Directorate of Defence Counsel Services
Counsel for Corporal J.L. Hentges