Citation: *R. v. Corporal J.L. Hentges*, 2007cm2019

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
(Accused)

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 - APPLICANT'S RIGHTS HAVE BEEN INFRINGED - LOSS OF THE APPLICANT'S OPPORTUNITY TO ELECT TO BE TRIED BY HIS COMMANDING OFFICER PURSUANT TO SECTION 69 OF THE *NATIONAL DEFENCE ACT* (THE "ELECTION") OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

(Rendered orally)

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[1] At his trial by Standing Court Martial on 33 charges under the National Defence Act, the accused, Corporal Hentges, brings an application prior to plea for a stay of proceedings based upon an infringement of the right of the applicant guaranteed by section 7 of the Canadian Charter of Rights and Freedoms. On 27 June '07, I made a ruling dismissing the application for reasons to be provided in due course. These are those reasons.

[2] The grounds for the application are set out in summary in the written notice of the application marked as Exhibit M1-1 and were developed more fully in argument by counsel on behalf of the applicant. In substance, the applicant argues that the delay in the conduct of the police investigation into the alleged offences before the court resulted in the loss of the opportunity for the applicant to elect to be tried in a summary way by his commanding officer rather than a trial by way of court martial. It is argued that this has resulted in unfairness to the applicant that should be remedied by a stay of proceedings. The applicant relies upon the decision of the Court Martial Appeal Court in R. v. Grant, to which I will refer below.

[3] In the course of his argument, counsel on behalf of the applicant modified his position in two important respects. First of all, it is now recognized that most of the charges before the court cannot be tried summarily under Queen's Regulations and Orders article 108.07, are therefore not subject to an election under QR&O 108.17, and therefore, must proceed, if at all, by court martial. These are 19 charges of making a false entry in a document required for official purposes contrary to section 125(a) of the National Defence Act, charges number 2, 3, 4, 5, 6, 8, 10, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33, four charges of forgery contrary to section 367 of the Criminal Code, charges number 7, 9, 11 and 12, and two charges of obtaining by false pretences contrary to section 362 (1)(a) of the Criminal Code, charges number 13 and 14.

[4] Thus, the application for a stay of proceedings is now made only in respect of charge number 1, being a charge of stealing contrary to section 114 of the National Defence Act, and charges 15, 16, 17, 18, 19, 20 and 22 being seven charges of an act of a fraudulent nature contrary to section 117(f) of the National Defence Act.

[5] Secondly, in the course of his argument, counsel for the applicant disavowed reliance on section 7 of the Charter, but submits that the authorities have breached section 162 of the National Defence Act, and that a stay of proceedings should be granted because of the breach.

[6] In R. v. Grant, [2007] CMAC 2, the Court Martial Appeal Court vacated the finding of guilty at trial on one charge of assault causing bodily harm. In that case, the charge was instituted by the signing of a record of disciplinary proceedings, slightly more than one year following the date of the alleged offence. There is a limitation period within which summary trial proceedings must begin, found in section 69(b) of the National Defence Act, of one year from the day on which the offence is alleged to have been committed. The court found that Grant was denied the opportunity to elect summary trial before his commanding officer by reason of the "inordinately long delay in processing the charge." The matter therefore proceeded to trial by court martial despite the efforts of the unit to bring the matter to summary trial before the expiration of the one year limitation.

[7] In the present case, the first charge, a charge of stealing on or about 13 April 2005, was instituted within one year of the date of the alleged offence date by a record of disciplinary proceedings signed 28 March 2006. The RDP is before me as part of Exhibit M1-2. The RDP also contains a charge of wilfully making a false entry in a document required for official purposes. There is no evidence that the unit wished to have the charge of stealing dealt with by summary trial. The fact that the RDP was signed within the year prescribed by section 69(b) and the fact that a non-electable charge of making a false document was charged at the same time, both militate strongly against such a finding in this case and distinguish this case from the case of Grant.

[8] As part of Exhibit M1-2, there is also an RDP signed 11 September 2006 before me. The first charge in that RDP is a charge of an act of a fraudulent nature being the use of a DND issued credit card for personal transactions between 11 May 2004 and 8 September 2004. It appears that this alleged conduct underlies the seven charges of an act of a fraudulent nature in the charge sheet before me. I conclude, therefore, that those seven charges before me were not originally charged until some two years or more after the alleged offence dates. Therefore, as in the case of Grant, the applicant is facing seven charges that were not laid until after the expiry of the limitation contained in section 69(b) of the National Defence Act, and had the charges been laid within a period of one year, they might have been dealt with at the unit level rather than proceeding to court martial.

[9] There is some evidence before me in the form of a memorandum signed by Colonel J.C. Rochette referring these charges for court martial, Exhibit M1-3, that the unit considered that the extensive unexplained delay in the police investigation of the charges of alleged fraud offences jeopardizes "any chance of trying this matter by way of summary trial." I note, though, that in the same document, Colonel Rochette stated, "Given the nature of the charges, the matter cannot proceed by way of summary trial." On all the evidence, I am unable to conclude that the unit would have proceeded by summary trial in respect of these charges if that option had been open and the applicant had elected for a summary trial.

[10] Dealing with the issue of remedy, section 162 of the National Defence Act provides, and I quote:

> **162.** Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

In the case of *R. v. Grant*, the Court Martial Appeal Court held that this provision applies at the investigative stage of proceedings before a charge is reduced to writing in a record of disciplinary proceedings. The court held that the applicant in that case had a legitimate expectation that the charge would be dealt with by summary trial. The unjust deprivation of the benefit of summary procedure resulted in a breach of section 162. The court held that a stay of proceedings was not an appropriate remedy for the pre-charge delay in that case. Instead, the court went on to remit the case to a commanding officer for summary trial of the charge.

[11] In the present case, the applicant relies on *Grant* for the holding that pre-trial delay to court martial may result in a violation of section 162 of the *National Defence Act*, but he seeks only the remedy of a stay of proceedings. His counsel stated that he does not seek the remedy that was ordered in the case of *Grant*. Indeed, counsel for the applicant suggests that this court does not have jurisdiction to order the remedy that was awarded in the case of *Grant*. I do not have to decide whether this particular submission is correct in law, but I do have to decide whether the remedy of a stay of proceedings should be given.

[12] The test for the granting of a stay of proceedings is well settled in cases involving a breach or infringement of rights guaranteed by the *Canadian Charter of Rights and Freedoms*. Apart from cases of unconstitutional delay under section 11(*b*), it is to be granted only in the clearest of cases where no other lesser remedy would be adequate to address the wrong.

[13] In the present case, the applicant does not argue that a *Charter* guaranteed right has been infringed, but a court may still impose a stay of proceedings in a proper case. These are referred to as the residual category of procedural abuse

cases. The nature of the residual category of cases and the analysis applied on an application such as this, was discussed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Tobiass,* [1997] 3 S.C.R. 391, at paragraph 89, etc., and I quote:

> 89. Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a "residual category" of cases in which a stay may be warranted. L'Heureux-Dubé J. described it this way, in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73:
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> > This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

I continue with the quote from Tobiass:

> The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.
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> 90. If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
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> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
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> (2) no other remedy is reasonably capable of removing that prejudice. (*O'Connor*, *supra*, at para. 75.)
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> 91. The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as

> well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.
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> 92. After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding.

And see also *R. v. Reagan*, [2002] 1 S.C.R.

[14] In my view, it cannot be said that if the delay investigating the allegations of fraudulent acts referred to in charges 15, 16, 17, 18, 19, 20 and 22 caused any prejudice to the applicant by denying him the opportunity of dealing with the charges at a summary trial, that that prejudice would be manifested, perpetuated or aggravated by the conduct or outcome of this trial, nor do I believe that the continuation of the prosecution on these charges of stealing and fraud would offend the community sense of justice or outrage standards of decency. A stay of proceedings is a wholly disproportionate remedy for the wrong that is complained of here. For these reasons, the application was 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