Citation: *R. v. Able Seaman S.A. Fenwick-Wilson*, 2007 CM 4021

Docket: 200673

STANDING COURT MARTIAL
CANADA
BRITISH COLUMBIA
CANADIAN FORCES BASE ESQUIMALT

Date: 31 July 2007

PRESIDING: LIEUTENANT-COLONEL J -G. PERRON, M.J.

HER MAJESTY THE QUEEN
v.
LEADING SEAMAN S.A. FENWICK-WILSON
(Accused)

DECISION RESPECTING AN APPLICATION UNDER SECTION 7 AND SUBSECTION 11(B) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

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[1] The accused, C60 573 673 Able Seaman Fenwick-Wilson, is charged with having consumed marijuana contrary to article 20.04 of the Queen's Regulations and Orders for the Canadian Forces. The applicant, the accused, has made two applications under subparagraph 112.05(5)(e) of the QR&O. The applicant alleges that an abuse of process and an unreasonable delay has occurred in this matter and thus her rights under section 7 and subsection 11(b) of the *Charter of Rights and Freedoms* have been breached. The applicant requests the court to order a stay of proceedings pursuant to subparagraph 24(1) of the *Charter of Rights and Freedoms*.

[2] The evidence presented by the applicant consisted of a statement of facts, the affidavit of Able Seaman Fenwick-Wilson, as well as the testimony of Able Seaman Fenwick-Wilson during the cross-examination on her affidavit.

[3] The respondent submits the applicant has not met the onus of demonstrating that the delay in bringing this matter to trial was unreasonable in all the circumstances of this case and that the applicant has not presented any evidence of profound anxiety or psychological stress. Finally, the respondent submits that these applications requesting a stay of proceedings pursuant to section 24 of the *Charter of Rights and Freedoms* be dismissed.

[4] The relevant provisions of the *Charter of Rights and Freedoms* that apply in this matter are section 7 and subsections 11(*b*) and 24(1). Section 7 of the *Charter* provides that:

> 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.

Subsection 11(*b*) reads:

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

Paragraph 24(1) reads as follows:

> 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.

[5] Section 162 of the *National Defence Act* provides that:

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

Duty to Act Expeditiously

Section 7

[6] The first application alleges that the continuation of these proceedings will amount to an abuse of process and thus a violation of section 7 of the *Charter*. The applicant submits that the delay of 13 months from the date of the alleged offence to the date the applicant was charged represents an abuse of the court's process, and the culmination of the simple nature of the charge, the applicant's cooperation with the CFNIS, the loss of the opportunity to elect the mode of trial pursuant to subsection 163(1) of the *National Defence Act*, and the resulting stress and anxiety suffered by the applicant permit the court to grant a stay of proceedings as the appropriate remedy.

[7] The applicant asked this court to affirm that "the right to elect summary trial" is indeed a right. The applicant submitted that it was highly prejudicial for the accused to miss the opportunity to elect to be tried summarily and that it was the actions of the CFNIS that prevented the applicant from taking advantage of this right. The applicant further argued that these proceedings would be oppressive when compared to the summary trial process afforded to Able Seaman Ibbotson.

[8] The respondent asserts the applicant did not provide the court with any evidence of profound anxiety or of psychological stress and that all but 4 months of the 13 months pre-charge delay may be accounted for.

[9] The key questions this court must answer in respect of this application are: Does the right to elect trial by summary trial exist? Has there been a breach of the principle of fundamental justice in this matter? Has there been an abuse of process? And, if the answer to the second and third questions was yes, has the applicant suffered any prejudice that warrants the remedy of a stay of proceedings.

[10] The first question was answered in the *Langlois* decision as confirmed in the 2007 CMAC *Grant* decision, CMAC 493. The *Langlois* decision, at paragraph 45, asserts there exists no right to be tried by summary trial. The language of section 162.1 of the *National Defence Act* clearly indicates that an accused has a right to be tried by court martial except in the circumstances prescribed in regulations made by the Governor in Council. These circumstances may be found at article 108.17 of QR&O. Article 108.16 of QR&O provides that a presiding officer at a summary trial could also decide that the accused may not be tried by summary trial if certain of the conditions set out in this article preclude the officer from trying the accused.

[11] I will now turn my attention to section 7 of the *Charter*. In *R. v. Kalanj,* [1989] 1 S.C.R. 1594, McIntyre J. specified that section 7:

> ... [A]pplies to all stages of the investigatory and judicial process....

In *R. v. White*, [1999] 2 S.C.R. 417, the Supreme Court of Canada provides the three steps a court must follow in its analysis of section 7:

> The first question to be resolved is whether there exists a real or imminent depravation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether a deprivation has occurred in accordance with the relevant principle or principles.... Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner that does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

[12] In the present case there was no actual or potential deprivation of life or liberty of Able Seaman Fenwick-Wilson. I must now determine if there exists any interference with the security of the person. The Supreme Court of Canada has held in numerous decisions, *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, being but one example, that security of the person has been held to protect both the physical and the psychological integrity of the individual. State interference with bodily

integrity and serious state imposed psychological stress constitutes a breach of an individual's security of the person.

[13] As set out in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, not all state interference with an individual's psychological integrity will engage section 7. Only "serious state imposed psychological stress" will represent the type of state interference that would rise to the level of infringing section 7.

[14] Able Seaman Fenwick-Wilson's affidavit indicates that she has had difficulty sleeping for the last two years, that she is fearful for her career, that she does not enjoy her job, and that she lacks motivation at home and at work. She testified that her career manager has told her the pending disciplinary procedures have had an adverse effect on her career progression. She has also testified that she would have missed three QL5 courses, but is scheduled to attend a QL5 course in September 2007. These consequences, other than her difficulty in sleeping soundly, have occurred since the charge was laid.

[15] I find that the evidence presented during this application does not meet the threshold of serious state imposed psychological stress. I have not been provided with any evidence indicating that a significant level of psychological distress or of any resulting consequences on the applicant's mental or physical health would have been caused by the pre-charge delay. Therefore, I find that there has been no breach of the applicant's section 7 rights.

[16] Has there been an abuse of process in this case? Concern for the individual right of the accused may be accompanied by concerns about the integrity of the judicial system or of the disciplinary system in the military context. It is clear that she does not have a right to elect trial by summary trial. In the present case there has been no assertion by the applicant that trial by court martial would mean an unfair trial or that it would impair her procedural rights under the *Charter*. The applicant has not provided the court with any evidence of substantial prejudice caused by the delay in laying the charge.

[17] The applicant also submits that these proceedings would be oppressive in comparison with the summary trial process involving Able Seaman Ibbotson. While it is correct to state that the applicant may be subject to a more severe punishment if found guilty at a court martial than if she was found guilty at a summary trial, I have no evidence before me as to the sentence given to Able Seaman Ibbotson nor has, at this time, Able Seaman Fenwick-Wilson yet been found guilty of the charge. Assuming that she would be found guilty, the principle of sentencing requiring that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different would apply in her case. Therefore, I have not been

provided with any evidence that would make me conclude that these court martial proceedings are or could be oppressive. Thus, in the present case, the laying of charges more than one year after the date of the alleged offence does not constitute an abuse of process.

[18] I have come to the determination that, based on the evidence presented to me, the applicant's rights under section 7 of the *Charter* and under the common law doctrine of abuse of process have not been breached by the fact that the CFNIS investigator laid the charge more than 13 months after the date of the alleged offence. I will now deal with the second application.

Unreasonable Delay

[19] The leading case in dealing with an application under subsection 11(*b*) of the *Charter* is the 1992 Supreme Court of Canada decision in *R. v. Morin*, [1992] 1 S.C.R. 771. The factors that are to be considered in analysing how long is too long are: The length of the delay; waiver of time periods; the reasons for the delay which include inherent time requirements of the case, actions of the accused, actions of the Crown, limits on institutional resources, and other reasons for delay; and finally, prejudice to the accused. The applicant and the respondent provided their analysis using these factors. As can be expected, each arrived at a different conclusion.

[20] The post-charge delay is approximately 16 months, being from 27 January 2006 to 22 May 2007. There was no implicit or explicit waiver of any time period on the part of the applicant.

[21] The ususal inherent time requirements for a matter involving a single charge are approximately four months. This case presents particular characteristics that influence its inherent time requirements. The operational tempo of the unit, a warship, is a factor that must be considered when assessing the inherent time requirements. The ship sailed from 29 January to 2 March 2006, two days after the CO, the commanding officer, had been provided with the Record of Disciplinary Proceedings and had forwarded it to AJAG Pacific for legal advice. I understand this advice to be the one required pursuant to article 107.11 of the QR&O. This advice was received on 20 March 2006.

[22] On 3 May 2006 AJAG Pacific provided the unit with a letter that I understand to be the document referred to in article 109.03 of QR&O. No evidence was presented to explain the period of time between 2 March and 3 May 2006. This was a simple matter since it involves but one charge with what appears straightforward evidence and it had to be referred to court martial because the one-year limitation period had lapsed. Therefore, since I have no information that would lead me to come to a

different conclusion, I find the 107.11 legal advice and 109.03 letter should have been provided to the unit much sooner

[23] I have not been provided with any evidence explaining why a ship at sea cannot receive such documents or why it cannot proceed with a charge as required by the relevant provisions of the QR&O. It appears from the evidence the unit did proceed with the necessary haste when it was in Esquimalt; therefore, it appears to me that the unit could not proceed with the charge while out at sea.

[24] I would count as inherent time requirements the period of 27 January to 2 March 2006. I have come to the conclusion that the period of 3 March to 3 May 2006 should count as actions by the Crown because this delay is not explained and is on its face deemed unreasonably lengthy.

[25] The period of 4 May to 20 June 2006 is also deemed to fall within the inherent time requirements.

[26] Although Able Seaman Fenwick-Wilson requested legal representation from DDCS on 1 May, no lawyer was assigned to the case until 10 October 2006. Although defence counsel is right when he asserts it is the Crown's duty to move a case along, one must also consider that the Crown was not dealing with an unrepresented accused, but with an accused that had requested representation by DDCS. DDCS has a duty (see section 249.19 of the *National Defence Act* and article 101.22 of QR&O) to assign a defence counsel. Any delay in assigning a defence counsel is surely not to the benefit of the accused and will have an impact on the efficient management of a case. Although the evidence indicates there was a lack of judicial availability during most of 2006, this situation appears to have been compounded by the fact there was no defence counsel assigned to the case. How could the Court Martial Administrator enter into any meaningful discussion on a possible trial date if no one is assigned to represent Able Seaman Fenwick-Wilson? Earlier discussions between defence counsel, the prosecutor, and the Court Martial Administrator could well have resulted in an earlier trial date. Accordingly, I attribute this period of time to actions by the accused.

[27] As stated at paragraph 44 of *Morin*, this is not putting the blame on the accused, but simply that "certain actions by the accused will be taken into account in determining what length of the delay is unreasonable". In this case, although it is the fact that no counsel had been assigned to the applicant and not the actions of the applicant that are in issue the result is the same. In a military context, where the *National Defence Act* provides for the legal representation of the accused, I consider that the period of 20 June to 10 October, which is approximately three months and three weeks, is to be considered "actions taken by the accused which may have caused delay."

[28] The period of 10 October 2006 to 28 February 2007 is deemed as inherent time requirements for the case since both counsel were communicating with each other and were trying to set a date for the trial.

[29] Finally, the period of 28 February to 22 May 2007 is also deemed inherent time requirements for the case since it was the period of time between the date the court martial was convened and the actual date of the court martial.

[30] Before discussing the prejudice to the accused I will set out again my conclusions pertaining to the different causes for the delay in this specific case. They are: Total length of the delay, approximately 16 months, 26 January 2006 to 22 May 2007; waiver of time periods by the accused, none; reasons for the delay: Inherent time requirements, approximately 10 months; actions by the accused, approximately 3 months three weeks; actions by the Crown, two months; limits on institutional resources, none; and other reasons for the delay, none. Therefore, the delay attributable to the Crown, in excess of what should be considered as reasonable in this specific case, is approximately two months. This is not a delay that would, by itself, cause prejudice to the applicant.

[31] The applicant has described the prejudice she alleges she has suffered because of the delay. The negative consequences to the applicant associated to these disciplinary proceedings were not caused by a lengthy unreasonable delay in bringing this matter to trial; they are the result of a combination of reasons that lead to a lengthy period of time before this matter could be tried by Standing Court Martial. I do not find that the applicant has suffered a prejudice that justifies the remedy sought by the applicant. The Supreme Court of Canada has clearly stated that a stay of proceedings should only be granted in the clearest of cases. (See *R. v. O'Connor*, [1995] 4. S.C.R. 411).

[32] Defence counsel has also argued that the circumstances of the pre-charge delay should be considered when assessing the post-charge delay.

[33] Justice Décary, in *R. v. Langlois*, CMAC-443, examined the previous *Perrier* and *Larocque* decisions before arriving to the conclusion that:

> ... [T]he pre-charge is a factor that has an influence in identifying a principle of fundamental justice, but that factor does not by itself imply a breach of fundamental justice. The pre-charge delay should rather be taken together with other factors, the combined effect of which places the government's conduct in the "residual category" described by L'Heureux-Dubé J. in *O'Connor* ...
>
> > ... 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

> degree that it contravenes fundamental notions of justice and ... undermines the integrity of the judicial process.

[34] The CMAC in *Langlois* indicated that:

> It would not seem desirable to treat as a principle of fundamental justice a duty to act expeditiously that imposes time constraints on any inquiry, further inquiry or reopened inquiry regardless of the circumstances.

It then quoted comments by Stevenson J. from the Supreme Court of Canada decision in *R .v. L.(W.K.)*, [1991] 1 S.C.R. 1091, on this point.

[35] In *R. v. Kalanj*, McIntyre J. addressed the issue of the length of the investigatory period at paragraph 19 by stating that:

> The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made. Circumstances will differ from case to case and much information gathered in an investigation must, by its very nature, be confidential. A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence. It is notable that the law—save for some limited statutory exceptions—has never recognized a time limitation for the institution of criminal proceedings. Where, however, the investigation reveals evidence that would justify the swearing of an information, then for the first time the assessment of a reasonable period for the conclusion of the matter by trial becomes possible. It is for that reason that s. 11 limits its operation to the post-information period. Prior to the charge the rights of the accused are protected by general law and guaranteed by ss. 7, 8, 9 and 10 of the *Charter*.

[36] I do note that Justice McIntyre contemplated instances where the evidence could permit a court to assess when charges could have been laid, or as he put it, the swearing of an information, and what constitutes a reasonable period of time for the conclusion of the matter by trial. The period of 25 October 2004 to 23 September 2005 appears to be a period of time that falls within reasonable parameters for an investigation.

[37] Such questions must, of course, be answered by keeping in mind the military context that surrounds any offence charged under the Code of Service Discipline. The Supreme Court of Canada described the purpose and role of military tribunals and of discipline in its 1992 *Généreux* decision, [1992] 1 S.C.R. 259. Justice Lamer viewed the Code of Service Discipline as the means of maintaining discipline and integrity in the Canadian Forces, but also as a means of punishing specific conduct which threatens public order and welfare where an offence is committed by a member of the military or other persons subject to the Code of Service Discipline.

[38] Although the *Généreux* decision's main preoccupation was to determine if a General Court Martial was an independent tribunal as contemplated by subsection 11(*d*) of the *Charter*, Justice Lamer's comments described the role of military tribunals *vis-à-vis* discipline and military justice, and they may also be applied to summary trials. Justice Lamer recognized that:

> ... To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct....

He recognized the need for a code of service discipline that allows the CF to meet its particular disciplinary needs. He also acknowledged the need for separate tribunals to enforce special disciplinary standards in the military.

[39] Justice Lamer then noted that members of the court martial, who are the triers of fact, are chosen from the ranks of the military. He remarked that their training is designed to ensure that they are sensitive to the need for discipline, obedience, and duty on the part of the members of the military and also to the requirements for military efficiency. He concluded by stating:

> ... Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military....

He agreed with the statement that:

> ... [A] military officer must be involved in the administration of discipline at all levels....

[40] A variation of this discourse was the subject of comments by both the majority and the minority in the 1997 Supreme Court of Canada decision in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, where it was noted that the life experience of a judge was an important factor in a trial, but that every judge was asked to judge in an impartial manner.

[41] Article 108.02 of QR&O provides that:

> The purpose of summary proceedings is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.

[42] A commanding officer plays a key role in the administration of discipline in his or her unit because a commanding officer is also invested with the ultimate

responsibility for the welfare of his or her subordinates and the operational efficiency of his or her unit.

[43] In the case at hand, the commanding officer of the accused could not offer her an election for mode of trial since the one-year limitation period had expired. The evidence indicates the applicant would have elected to be tried summarily and the CO would have proceeded by way of summary trial had that option been available to them. This option was not available because the charge before this court was laid by the CFNIS investigator on 26 January 2006, almost thirteen months after the date of alleged offence.

[44] The investigation into possible drug use amongst members of HMCS VANCOUVER was initiated in October 2004. The CFNIS investigator became aware of Able Seaman Fenwick-Wilson's involvement in the case in January 2005. Able Seaman Fenwick-Wilson admitted to the CFNIS investigator on 27 April 2005 that she had used marijuana in January 2005. The part of the investigation pertaining to Able Seaman Fenwick-Wilson appears to have been concluded on 31 August 2005 since pre-charge legal advice on the matter before this court was requested on that date. This legal advice was received on 23 September 2005. On 19 November 2005 the investigation regarding the applicant and all other related matters, which I understand to mean the other three CF members being investigated, was concluded. Therefore, it appears from this evidence that the CFNIS investigator could have laid the charge against Able Seaman Fenwick-Wilson as early as 23 September 2005 or at the latest on 19 November 2005. The respondent could not provide the court with any evidence to explain the four-months' delay between 23 September 2005 and 26 January 2006.

[45] No explanation was given for this delay in laying the charge. Members of the CFNIS are surely aware of the one-year limitation period included in the Code of Service Discipline, of the duty to act expeditiously, and of the provisions of article 108.02 of the QR&O.

[46] Each individual who plays a role in the military justice system, be they members of the CFNIS, legal advisors, or prosecutors, should understand that their role is to support commanding officers and the chain of command in ensuring that discipline within the Canadian Forces is enforced and respected. Commanding officers and the chain of command are ultimately responsible for the discipline of CF members and the underlying role discipline plays in ensuring that the CF performs its operational tasks efficiently and with success. Investing the necessary efforts to enable the chain of command to perform its critical disciplinary role should be the goal of every participant of the military justice system. It appears to me that in the matter at hand the CFNIS investigator did not consider the laying of the charge before the one-year limitation had lapsed to be of great importance, notwithstanding the fact that he had at least six weeks and quite possibly up to three months in which to achieve this objective. Had this

charge been laid in late September or even on or about 19 November 2005, it is quite possible that the CO of HMCS VANCOUVER would have tried summarily Able Seaman Fenwick-Wilson before 1 January 2006.

[47] What are the consequences of this delay in laying charges? They are numerous: The loss of opportunity for the CO to effect discipline in his unit; the loss of opportunity for the accused to choose a mode of trial that would permit her to face justice at the earliest opportunity as well as a choice of mode of trial where the maximum punishment is much lower than the punishment at a court martial; and the creation of a considerable post-charge delay and its inherent negative consequences for the CF and for the individual. While an individual might not suffer the level of prejudice that would warrant a remedy under the *Charter*, the normal delay associated with a court martial is definitely much longer than one for a summary trial and should normally cause the accused more stress. Resources that could have been dedicated to other cases had to be invested in this case. Simply put, the unexplained and unjustified delay in laying this charge has been prejudicial to the applicant and to the CF because discipline could not be enforced effectively, efficiently, and speedily as would have been the case had a summary trial been held before 1 January 2006.

[48] The military justice system is different from the Canadian criminal justice system because its primary purpose is the maintenance of discipline in the CF. When conditions permit this type of service tribunal, a summary trial is the principle tool that allows the chain of command to perform its fundamental responsibility of restoring discipline when a breach to the Code of Service Discipline has occurred. Unjustified actions that prevent the chain of command or the accused from choosing this disciplinary process could well fall within the residual category contemplated by Justice L'Heureux-Dubé since they could undermine the integrity of the judicial process. Keeping in mind our specific military context, I would substitute "disciplinary process" for "judicial process."

[49] I have already concluded that this unjustified delay in laying the charge and its consequences do not amount to an abuse of process or to a breach of section 7 of the *Charter*. I have come to this conclusion because I have not been provided with any evidence that would lead me to determine that the intentional act of laying a charge after the one-year limitation period could fall within the residual category described in the *O'Connor* decision or that it could represent conduct on the part of the CFNIS that demonstrates improper motives or bad faith or an act that violates the conscience of the community or that could bring the administration of military justice into disrepute. The court requires evidence to come to such conclusions. No such evidence has been presented in this case. My decision might have been different had I been presented with such evidence.

[50] For the reasons provided earlier in this decision, the court denies the applications made under subparagraph 112.05(5)(e) for a stay of proceedings pursuant to paragraph 24 of the *Charter of Rights and Freedoms*. These proceedings under subparagraph 112.05(5)(e) of QR&O are terminated.

Lieutenant-Colonel J -G. Perron, M.J.

Counsel:

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