Citation: *R. v. Master Corporal T.J. Mills*, 2008 CM 4011

Docket: 200819

STANDING COURT MARTIAL
CANADA
ALBERTA
4 WING COLD LAKE

Date: 23 September 2008

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, MILITARY JUDGE

HER MAJESTY, THE QUEEN
v.
MASTER CORPORAL T.J. MILLS
(Accused)

APPLICATION UNDER SECTION 11(*B*) OF THE *CHARTER*
UNREASONABLE DELAY

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[1] The accused, V19 573 631 Master Corporal Mills, is charged with having committed two offences. More specifically, he is accused of using his C8 rifle when committing an assault on another soldier, and he is accused of cocking his C8 rifle when confronting that same soldier. The accused has made an application under subparagraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces. The applicant alleges that an unreasonable delay has occurred in this matter, and thus his rights under subsection 11(*b*) of the *Canadian Charter of Rights and Freedoms* have been breached. The applicant requests that, as the appropriate remedy for his alleged breach, the court order a stay of proceedings pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*.

[2] The respondent, the prosecution, submits the applicant has not met the onus of demonstrating that he has suffered any prejudice resulting from the delay in bringing this matter to trial in all the circumstances of this case. The respondent submits that this application requesting a stay of proceedings be dismissed.

[3] The evidence presented by the applicant and the respondent consisted of an agreed statement of facts and of counsel's answers to questions posed by the court. The court took judicial notice of the facts contained in Military Rule of Evidence 15.

[4] The relevant provisions of the *Charter of Rights and Freedoms* that apply in this matter are subsections 11(*b*) and 24(1). Subsection 11(*b*) reads as follows:

> 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 and 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* reads as follows:

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

Section 162 of the *National Defence Act* was modified in July 2008. Before this modification this section read as follows:

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

[6] The applicant and the respondent agree that the leading case in dealing with this type of *Charter* motion is the 1992 Supreme Court of Canada decision in *R. v. Morin*, [1992] 1 S.C.R. 771. This decision provides lower courts with direction as to the purpose of section 11(*b*). At paragraphs 26 to 30 Sopinka J. indicated that:

> The primary purpose of s. 11(*b*) is the protection of the individual rights of accused....
>
> The individual rights which the section seeks to protect are ... the right to security of the person ... the right to liberty, and ... the right to a fair trial.

He then explained that the right to security of the person is protected 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. At paragraph 29 he states that:

> ... [S]ociety ... has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public.

Finally, at paragraph 30, citing *R. v. Conway*, [1989] 1 S.C.R. 1659, he restates the Supreme Court of Canada's recognition that:

> ... The interests of the accused must be balanced by the interests of society in law enforcement. As the seriousness of the offence increases so does the societal demand that the accused be brought to trial....

[7] Justice Sopinka provides us with a general approach to a determination as to whether a right has been denied. He states that this general approach is not by the application of a mathematical or administrative formula, but rather by a judicial determination balancing the interests which this section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.

[8] He then indicates which factors are to be considered in analyzing how long is too long. These factors are (1) the length of delay, (2) the waiver of time periods, (3) the reasons for 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 the 4th factor, prejudice to the accused.

[9] The applicant and the respondent basically agree that this period of approximately 20 months from the time the charges were laid on 30 January 2007 to the date of the trial on 22 September 2008 is sufficient to raise the issue of the reasonableness of this delay. The respondent concedes there is no explicit or implicit waiver by the applicant of his section 11(*b*) rights. The applicant submits there were no actions by the Crown that added to the delay.

[10] The applicant and the respondent provided their analysis using these factors. As can be expected, each arrived at a different conclusion. Before I proceed with my analysis by following the factors provided in *Morin*, I will indicate the key dates and corresponding actions that I consider important in the determination of this motion:

> On 25 December 2005 the incident allegedly took place.
>
> On 30 January 2007 charges were laid against Master Corporal Mills by the CFNIS. The record of disciplinary proceedings was served unto the accused and a copy was given to his commanding officer. Master Corporal Mills was a member of 2 Service Battalion.

On 22 February 2007 the CFNIS provided disclosure to the CO of the accused.

On 13 March 2007 the commanding officer of the accused referred the charges to Commander 2 ASG, his formation commander.

On 19 March 2007 Master Corporal Mills signed the form indicating he wished to be represented by DDCS.

On 3 April 2007 Commander 2 ASG applied for disposal of the charges to the referral authority, Commander Joint Task Force Central, LFCA. This referral package was misplaced until approximately 31 December 2007.

On 14 January 2008 DDCS received Master Corporal Mills' request for representation.

On 15 January 2008 Commander Joint Task Force Central, LFCA, referred the charges to the Director of Military Prosecutions.

On 22 January 2008 DMP received the referral package. On that same date, DDCS assigned Lieutenant(N) Létourneau as defence counsel for Master Corporal Mills.

On 23 January 2008 DDMP assigned the file to Major MacLeod for post-charge screening.

On 19 February 2008 Major MacLeod sent her post-charge screening to DDMP. The next day DDMP preferred the charges against the accused and forwarded the charge sheet to the Court Martial Administrator indicating the prosecution was ready to proceed as of 1 March 2007 or on two weeks' notice.

On 20 February 2007 although not at the request of defence counsel, Major MacLeod sent the disclosure package to Lieutenant(N) Létourneau.

On 14 March 2007 the accused was served with a copy of the charge sheet.

On 26 and 27 March 2008 Lieutenant(N) Létourneau withdrew from the case because he had accepted a position as a provincial Crown prosecutor. He had not finished preparing the case and was not ready to

set trial. Major MacLeod, having asked Lieutenant(N) Létourneau by email if he could participate in a trial coordination conference call set for 28 March, Lieutenant(N) Létourneau replied to Major MacLeod that he could not represent Master Corporal Mills any longer and that Lieutenant(N) Desbiens would replace him.

On 1 April 2008 DDCS assigned Lieutenant(N) Desbiens as defence counsel for Master Corporal Mills.

On 24 April 2008 in light of the court martial appeal Court *Trépanier* decision, the Chief Military Judge stopped holding telephone conference calls to set trial dates and the Court Martial Administrator stopped convening courts martial.

On 1 May 2008 Lieutenant(N) Desbiens was set to take the matter to trial and was awaiting the next telephone conference call to set a date for trial.

On 9 May 2008 the Court Martial Administrator returned every charge sheet, including the one for Master Corporal Mills, to DMP. Those charge sheets were cases that had not yet been convened.

On 18 July 2008 modifications to the *National Defence Act* pertaining to the convening of courts marital came into force and the charges against the accused were preferred by DDMP.

29 July 2008 the Court Martial Administrator informed the prosecutor and defence that telephone conference calls to set trial dates would resume as soon as counsel was ready to proceed. On that same day Major MacLeod asked Lieutenant(N) Desbiens by email if he was ready to proceed to trial.

On 31 July 2008 Lieutenant(N) Desbiens replied to the email indicating that he was ready to proceed and that he would be presenting an application for unreasonable delay. That same day the accused was served with a new charge sheet.

On 7 August the 22 September 2008 trial date was set during a telephone conference call involving the Chief Military Judge and both counsel in this matter.

And, finally, on 17 September 2008 Lieutenant(N) Desbiens advised the prosecution that he had been prepared to set a date for trial since 1 May 2008.

[11] Firstly, I agree with both counsel that on its face this 20 month delay raises an issue as to its reasonableness. I also agree with both counsel that there has been no explicit or implicit waiver by the applicant of his section 11(*b*) rights, and I agree with the applicant that there were no actions by the Crown that added to the delay.

INHERENT TIME REQUIREMENTS OF THE CASE

[12] I must now address the reasons for the delay by firstly examining the inherent time requirements for this case. The applicant suggests that the inherent time requirements for this case is approximately 3 months, while the respondent suggests that a period of approximately 5 months is appropriate. Having thoroughly reviewed the Supreme Court of Canada *Morin* decision as well as the Court Martial Appeal Court decision in *ex-Private Alain Francis LeGresley v. R.,* 2008 CMAC 2, I found that their positions, although not identical, are within the acceptable range for a case of this nature. As mentioned by defence counsel, this case does not appear to be complicated since it involves one incident involving one complainant and one action on the part of the accused.

ACTIONS OF THE ACCUSED

[13] As stated at paragraph 44 of *Morin* "there is no putting blame on the accused when looking at the actions of the accused." But simply that "certain actions by the accused will be taken into account in determining what length of the delay is reasonable." In this case, the respondent submits that the period of 26 March to 31 July 2008, approximately 4 months, should be counted under this heading, the heading being actions of the accused, while the applicant argues that only one week, being from 26 March to 1 April 2008, is the appropriate time period.

[14] Lieutenant(N) Létourneau was initially assigned to represent Master Corporal Mills on 23 January 2008. Although he did not make a request for disclosure, he received disclosure on the 20th of February. Charges were preferred on the 20th of February, but the accused was only served on 14 March. On 26 March Lieutenant(N) Létourneau had to withdraw from the case. The evidence reveals that he was not ready to proceed to trial. Lieutenant(N) Desbiens was assigned to represent Master Corporal Mills on 1 April. Although he was ready to proceed to trial on 1 May, he never informed the prosecutor until 17 September. Lieutenant(N) Létourneau and Lieutenant(N) Desbiens never initiated any communication with the prosecutor.

[15] It is clear from the Supreme Court of Canada decisions in *Mills v. R.*, [1986] 1.S.C.R. 863, in *R. v. Askov*, and in *Morin*, that the onus of bringing a matter to trial falls squarely on the prosecution and not on the accused. It does appear from the evidence that neither defence counsel was exerting any effort to move this case at a faster pace. This lack of action on the part of defence counsel is "considered and

weighed in the overall balancing," (see *LeGresley* at paragraph 56). The *Trépanier* decision, 2008 CMAC 3, caused a halt to the convening process and consequently the trial date coordinating telephone conference calls. No such calls were scheduled during the period of 24 April to 31 July 2008, therefore neither counsel could attempt to hasten the proceedings associated with the charges before this court during that time period.

[16] As stated by defence counsel, this is not a complicated case. The first defence counsel was not ready to proceed to trial after having been in possession of the disclosure for approximately one month. The second defence counsel was ready to proceed one month after having been assigned to the case. The change in defence counsel did not occur because the accused requested a new counsel, but it still occurred. A definite consequence of this change in counsel is that the new defence counsel did need a period of time to review the disclosure. This period of time, although quite reasonable, did cause this case to be affected by the *Trépanier* decision. There was no evidence to indicate if Lieutenant(N) Létourneau would have been ready to proceed to trial before the *Trépanier* decision. A more diligent effort on the part of the first defence counsel might have resulted in the trial date being set and the court being convened before the *Trépanier* decision.

[17] As stated in paragraph 40 of *Morin*:

> ... Neither side, however, can rely on their own delay to support their respective positions....

I find that the period of one month falls within the actions of the accused.

LIMITS ON INSTITUTIONAL RESOURCES

[18] As stated at paragraph 47 of *Morin*, institutional delay:

> ... [I]s the period that starts to run when the parties are ready for trial but the system cannot accommodate them....

The applicant suggests that the period of one and a half months can be assigned under this heading, but that it should not be counted as being unreasonable, while the respondent argues that there is no institutional delay since the trial date was set as requested by both counsel.

[19] I find there is no period of time that can be assigned to this heading.

OTHER REASONS FOR DELAY

[20] The accused is charged with a serious—objectively and subjectively, a serious offence. The charge alleging an assault with a weapon carries a maximum

sentence of imprisonment for ten years. The offences are alleged to have happened in Afghanistan and he would have used a C-8 when committing the offences. I would expect any person actively involved in the disciplinary procedures surrounding this case to recognize the importance and seriousness of these charges and to, therefore, ensure that the disciplinary process is dealt with as efficiently and expeditiously as possible. Unfortunately, the evidence paints quite a different picture in this case.

[21] The evidence does not explain why it took three weeks after the laying of charges for the CFNIS to provide the disclosure to the unit. The evidence also does not explain why disclosure is required at this stage of the disciplinary process. The evidence does not explain why it takes approximately six weeks for the commanding officer of the accused to refer the charges the referral authority via his formation commander. The agreed statement of facts then describes an unacceptable situation where the referral package would have been sent from Commander 2 ASG to Commander Joint Task Force Central, LFCA, without being properly identified and would thus have been misplaced since it appeared to have been mistaken for a public affairs envelope.

[22] The Queen's Regulations and Orders provide the framework for the administration of military justice. It appears from the dates of the alleged charges that the CO was precluded from trying the accused, (see *National Defence Act* section 69(b) as it was before 18 July 2008 and article 108.16(1)(a) of QR&O), and thus only a court martial could try the accused. Therefore, the CO had to refer the charges to a referral authority, (see article 108.16(3)(b) of QR&O). Article 109.03 stipulates that the application to a referral authority:

> ... [S]hall be forwarded directly to the appropriate referral authority

If the CO forwards an application to a referral authority who is not the immediate superior of the CO in matters of discipline, a copy of the application is sent for information to the other superior officer to whom the CO is responsible in matters of discipline.

[23] It appears that in the present case the commander of 2 ASG was not involved in the referral process as directed by the Queen's Regulations and Orders, but that he had inserted himself in the referral process. Any procedure in the administration of military justice that is not mandated by the Queen's Regulations and Orders risks of being the source of additional delays that might not be conducive to the efficient and effective enforcement of discipline. Military lawyers who act as legal advisors to the commanding officers, commanders, and their staff, should strive to advise these key actors in the disciplinary process of the negative impact that an unnecessary and unreasonable delay might have on discipline and on military justice. There is no evidence in the present case that justifies or explains why the referral package was not handled by Commander 2 ASG and Commander Joint Task Force Central, LFCA, and

their staff with the attention and importance it deserved. This type of carelessness does not reflect well on the importance they should attach to any disciplinary matter, even more so in this case when one considers the nature of the charges.

[24] What is as troubling to me is the fact that the commanding officer of the accused did not comply with the provisions of article 109.04. The duties of the commanding officer are clear and simple; when he forwards the application under article 109.03 he must advise the accused of his right to be represented by military counsel and he must advise DDCS of the wishes of the accused. This duty must be performed by the commanding officer and no one else. Although the commanding officer did have the information from Master Corporal Mills on 19 March 2007, this information was not relayed to DDCS until the referral package was found in some filing cabinet within the office of Commander Land Force Central Area in late December 2007. DDCS was informed of Master Corporal Mills' choice on 14 January 2008.

[25] What is the consequence on these proceedings of this unacceptable delay in complying with the provisions of article 109.04? This delay of ten months did prevent legal counsel from getting involved as early as possible with this case. Although one could assume that the defence counsel assigned to Master Corporal Mills could have inquired upon the prosecution about the status of this file, and that it might have assisted in rectifying the situation of the "lost referral package," the court will not speculate on this subject because it was not offered any evidence to assist it in determining what impact the early assignment of a defence counsel would have had on the case. It is clear that the accused was not represented until 22 January 2008 and that this was not his fault.

[26] The period of 3 April to 31 December 2007 definitely had a significant impact on this case. This delay of approximately nine months is totally unacceptable, and is due in part to the carelessness of certain persons involved in the referral process. The involvement of an additional actor in the referral process appears to have been one of the sources of this unacceptable delay. The omission on the part of the commanding officer to forward to DDCS the request of the accused was probably also instrumental in creating this unacceptable situation.

[27] The *Trépanier* decision caused a halt in the convening of courts martial and in the scheduling of telephone conference calls to set trial dates. These calls resumed after amendments had been made to the *National Defence Act* in July 2008. A period of approximately three months, from 24 April to 31 July 2008, will be counted as neutral since it was not caused by either party.

[28] Therefore, I determine that the delay attributable to the Crown in excess of what should be considered as reasonable in this specific case is approximately 12 months.

PREJUDICE TO THE ACCUSED

[29] I will now deal with the prejudice to the accused.

[30] The applicant did not present any evidence of prejudice, and stated that prejudice may be inferred mostly because of the delay and the proper administration of the 109.04 request for military defence counsel. The respondent argued there was no prejudice in this case and that evidence of a promotion for Master Corporal Mills and of his participation in an exercise could rebut the claim of inferred prejudice.

[31] While it is true that the evidence in this case does not make it a shining example of how the chain of command should administer military justice, the court does not find that the period of 12 months is so prolonged as to permit the court to infer prejudice from the facts of the case. The court was not provided with any evidence of any negative consequences that could be associated with this unreasonable delay. No evidence was presented concerning any undo stress, anxiety, or other source of prejudice resulting from the delay. The applicant did not explain what prejudice may be inferred from the fact that he was not represented by defence counsel until 22 January 2008.

[32] Inaction on the part of the accused or his counsel is a relevant consideration in assessing the degree of prejudice, if any, that an accused suffered as a result of the delay, (see *LeGresley* paragraph 66). Neither defence counsel made any attempt to contact the prosecutor to set a trial date. Therefore, it appears that the need to have an early trial date because of any prejudice to the accused was not felt to be that critical by either defence counsel.

[33] Based on the evidence before me, I find that the accused has not suffered any prejudice caused by the delay beyond the ordinary stress and anxiety that is bound to be felt by any accused facing serious charges.

CONCLUSION

[34] In *R. v. Carosella*, [1997] 1 S.C.R. 80, at paragraph 52, Sopinka J., writing for the majority, stated:

> A judicial stay of proceedings has been recognized as being an extraordinary remedy that should only be granted in the "clearest of cases". In her reasons in *O'Connor*, L'Heureux-Dubé J. stated (at paragraph 82) that:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were [to continue].

[35] Having found a delay of approximately 12 months is deemed unreasonable in the present case, I do not find that prejudice to the accused can be inferred from the delay since this delay cannot be qualified as prolonged, and I find that the applicant has not proven that he has suffered a prejudice from the delay.

[36] Although the delay is long and its causes reflect badly on the individuals involved in the referral process of this case the court is also aware of the societal interest of law enforcement and in the need to enforce discipline. These are serious charges. I do not find that irreparable prejudice would be caused to the integrity of the military judicial system if the prosecution of these charges was continued.

DECISION

[37] For these reasons the court denies the application made under paragraph 112.05(5)(e) for a stay of proceedings pursuant to paragraph 24(1) of the *Charter of Rights and Freedoms*.

[38] These proceedings under subparagraph 112.05(5)(e) are terminated.

LCol J-G Perron, M.J.

COUNSEL:

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